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MASTER OF LAWS

Does the contaminated land regime impose stewardship obligations on owners of land?

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Emma F. I. Lochery

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Does the contaminated land regime impose stewardship obligations on owners of land?

"*We are concerned not just for this generation, but for future generations. Our concept of continuity and of passing on to the next generation something better than we have received in the past is uniquely understood and supported*", [1] John Gummer.

Emma F I Lochery

090000290

A thesis submitted to the University of Dundee in fulfilment of the requirement of the Degree of Masters of Law by Research, June 2011.

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[1] John Gummer, House of Commons Hansard, 18/04/1995, Volume 258, Col 48.

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Acknowledgements

I would like to thank my supervisors Professor Colin Reid and Mr Gordon Cameron for their helpful and insightful comments and for their flexibility in allowing me to complete this thesis on a part-time basis. I would also like to thank my parents for their support and encouragement when deciding to do the degree and for their continuing faith in me. Finally, I would like to thank my fiancé Kester without whom this degree would never have happened, and who, it seems, is always right.

Declarations

I, Emma Lochery, declare that I am the author of the thesis; that, unless otherwise stated, all references cited have been consulted by me; that the work of which the thesis is a record has been done by me, and that it has not been previously accepted for a higher degree.

Signed Date

I, Professor Colin Reid, confirm that the conditions of the relevant Ordinance and Regulations have been fulfilled.

Signed Date

Abstract

Arguments that stewardship should be adopted as the foundation for ownership, or that it already best reflects the nature of regulation of ownership of land within the English legal system, are often made. What tends to follow from these statements however is not an examination of regimes impacting on owners of land, but arguments justifying why having a system based on stewardship would be desirable from an ethical or ecological point of view. The veracity of claims that stewardship obligations form part of our legal system is not often tested. This thesis attempts to take a step back from arguments based on justifications for stewardship, and will instead examine one element of land regulation, the regulation of contaminated land, to determine whether stewardship can, and does, form the basis of this regulation and what this can tell us about the place of stewardship as a legal principle.

After a brief general overview of the contaminated land provisions, contained in the Environmental Protection Act 1990, the thesis looks at the reasons why it is useful to examine the place of the principle of stewardship within the regime. The thesis then examines the nature of stewardship, as both a legal principle and an ethical one, and its manifestations in law, in order to determine the shape of a regime based on stewardship. It looks specifically at the justifications for stewardship in order to allow a deeper understanding of the meaning of stewardship, and then looks at the relationship between stewardship and ownership.

The second stage of the thesis is then to look at the contaminated land provisions to determine how the aim of improving the state of land for the future is reflected in the regime and where stewardship fits into this picture. The thesis does not deny that the regime has other aims and guiding principles, specifically the polluter pays principle, but it does deny that this is the only philosophy which motivated and colours the regime. In order to demonstrate this, the thesis makes a detailed discussion of the sorts of obligations and duties that come into play under the contaminated land provisions and the place of the owner of the land within this.

It should become clear that the contaminated land provisions were implemented on the back of (amongst others) an aim of improving the state of land for future generations. This aim is at the very heart of stewardship, but the contaminated land regime does not perfectly mirror what we might expect from a regime based on principles of stewardship. This can be seen when the hallmarks of stewardship are compared to the reality of the contaminated land provisions. This lack of fit can however be explained, and does not mean that the argument presented here cannot be sustained.

The reason, it is argued, is the content of the principles of stewardship themselves, and the difficulty of framing regulation on the back of these principles. Specifically uncertainty as to the future and the problem with regulation of decision-making processes pose problems for such regulation. As a result, even though there is this lack of fit, and to this extent the regime presents a compromise position, it is argued

here that the contaminated land provisions are an example of land ownership regulation based on stewardship, and an often-overlooked example at that.

As a result of this, the current interpretation and application of the regime, both in the courts and at local authority level, are mistaken in their reluctance to impose some form of liability onto owners of land where the owner did not cause or knowingly permit the contaminating substance to enter the land. The paper concludes by suggesting that an alteration to this interpretation, following recognition of the place of stewardship within the regime, would allow local authorities to carry out more remediation works and to recover the costs for doing so. This would mean that the regime would be better able to tackle the problem of historical contamination such that we can indeed pass land on in a better state than that in which we received it.

I: Introduction

The current contaminated land provisions were introduced in 1995, and since then have been little used, and the role of owners of land within the regime has received little attention. This thesis attempts to look at this role in detail, and, in doing so, to attempt to understand at least some of the reasons as to why the regime is not operating as its ambitious provisions suggest. The starting point for the research was in beginning to understand how the provisions in the regime interact with the rights of owners of land. It became clear that the regime was more complex in this regard than was initially suspected and elements of stewardship became apparent in the regime. The thesis does not attempt to justify regulation on the basis of stewardship, nor to argue that the contaminated land regime takes the correct approach. Instead it simply aims to analyse the regime in such a way as to bring out some of the more unusual features of the regime and the philosophy behind them. It also hopes to suggest that the interpretation of the regime to date has missed these important elements.

Specifically, the thesis asks whether the contaminated land provisions impose stewardship obligations i.e. an obligation to manage land for the benefit of others, including for the benefit of future generations, onto the owner of land. There is no doubt that the focus of the regime is on the polluter pays principle, and the thesis does not deny this. Nor does it deny that the provisions are intended to bring a benefit now. What it does deny is that the polluter pays principle is the only background principle in play here and that the regime is looking to benefit only the

present generation. Instead, the principles of stewardship also form part of the underlying philosophy of the regime and it seems that the regime may operate more successfully if these features were fully recognised. The regime looks to landowners and it looks to the future, and it does so through the background principle of stewardship.

This thesis attempts to demonstrate that stewardship principles are an important, but overlooked, aspect of the contaminated land regime by firstly looking at the contaminated land provisions in outline. This should allow an understanding of the overall operation of the regime and of where the owners of land fit into the picture. The thesis then justifies the focus of the paper and the motivation behind looking into the place of stewardship within the regime. From here, the meaning of stewardship is considered in some detail. This detail should allow the reader a much deeper understanding of what stewardship means, why it is relevant here, and what features of stewardship as an ethical and legal principle might form a part of the contaminated land provisions. Six hallmarks of stewardship can be gleaned from this discussion.

The thesis then looks at the contaminated land provisions in relation to these hallmarks and reaches the conclusion that there are good reasons to believe that, in addition to the polluter pays principle, the contaminated land provisions rely on stewardship principles. This should greatly help interpretation of this regime, and the problems with interpretation and the potential solution posed by the conclusions of this thesis are then discussed. It is hoped that the conclusions posed in this thesis may suggest a different method of interpreting and applying this regime or elements of

the regime, such that what is currently underused legislation can begin to have a much more wide-ranging impact on the historical legacy of contaminated land. The regime is about polluters, but it is about landowners as well.

II: The contaminated land regime- an overview.

Before assessing the regime, its aims, and its relationship with stewardship, it is necessary to give an outline indication as to the operation of the regime overall. The provisions relating to controlled waters and radioactive contamination will not be discussed independently here. The essential elements of the regime are to be found in Part IIA of the Environmental Protection Act 1990 (EPA 1990) as amended by the Environment Act 1995, but the true operation of these provisions can only really be understood when the Contaminated Land (England) Regulations 2006 (S.I 2006/1380)[2]- henceforth CL(E)R 2006- and most importantly, the statutory guidance in Circular 01/2006,[3] are taken into account. The guidance must be considered by the enforcing authority, and as a result, it performs a very important role of fleshing out the relatively sparse provisions of the EPA 1990.[4] The enforcing authorities in relation to contaminated land are local authorities and the Environment Agency.

The current provisions were introduced in the Environment Act 1995 after the recognition of the failures of the previous proposed system which was to be introduced in 1991. Section 143 of the EPA 1990 made provision for the setting up of a register of sites which had been used for generally contaminating activities in the past. This was intended on the one hand to alert purchasers and developers to the possibility of contamination, and on the other to avoid excessive costs being placed

[2] This thesis will only consider the position in relation to England and Wales. The provisions of the Environmental Protection Act 1990 (EPA 1990) also apply in Scotland but there are different regulations and guidance.
[3] United Kingdom, DEFRA, "The Environmental Protection Act: Part IIA- Contaminated Land", Circular 01/2006, (London: 2006).
[4] Environmental Protection Act 1990 (EPA 1990), Sections 78A(2), (5), (6); 78B(2); 78E(5); 78F(6); 78P(2)(b); 78Q(6); and 78W.

on local authorities whilst preventing planning blight.[5] It was however concluded that this system of registers would increase rather than decrease the potential for planning blight, and as a result, this option was abandoned. The Government then introduced new contaminated land provisions on the basis of the "Paying for Our Past"[6] consultation document and the "Framework for Contaminated Land"[7] paper.

As of March 2007 this system had led to the total clean-up of 144 of 746 sites identified as being contaminated,[8] with a further 35 sites[9] designated as special sites.[10] It is significant for the discussion that follows to note here that this clean-up has been achieved at an estimated cost of £55 million[11] with only a fraction of this recovered from appropriate persons (in relation to only 86 sites were costs recovered and of these in only 26 sites was there potential for recovery from a Class B person).[12] The system has thus proved expensive: perhaps, as will be argued here, it has proved more expensive for local authorities than the legislative provisions of the regime demand. The framework of this system outlined here.

Local authorities are charged with inspecting land in their area in order to identify contaminated land.[13] Land is contaminated where there is significant real or potential harm,[14] or significant real or potential pollution of water.[15] Harm[16] is

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[5] Stephen Tromans and Robert Turrall-Clarke, *Contaminated Land (2nd Ed)*, (London: Sweet & Maxwell, 2008) at 12.
[6] United Kingdom, Department of the Environment and Welsh Office, "Paying for Our Past", (London: 1994).
[7] United Kingdom, Department of the Environment, "Framework for Contaminated Land: Outcome of the Government's Policies Review and Conclusions from the Consultation Paper Paying for our Past" (London, 1994).
[8] United Kingdom, Environment Agency, "Reporting the Evidence" (Bristol: 2009) at 3.
[9] *Ibid*.
[10] See page 19.
[11] Environment Agency, *supra* n8 at 19.
[12] *Ibid at* 21.
[13] EPA 1990 Section 78B(1).
[14] EPA 1990, Section 78A(2)(a).

defined in section 78A(4) EPA 1990 as, "harm to the health of living organisms or other interference with the ecological systems of which they form part and, in the case of man, includes harm to his property".[17] This terse definition is expanded in Part 3 of Annex 3 of Circular 01/2006.

Harm will only be significant where the receptor, i.e. the living organism, ecosystem or property, is contained within Table A[18] and also where the harm is the type of harm listed as being significant in that Table.[19] For example, if the receptor is a human being, there will be significant harm if the substance in or under the land has led to, amongst other things, death, disease, or serious injury.[20] There must be a relevant "pollutant linkage" which is either resulting in significant harm, or presents the possibility of such harm. The assessment of such a linkage must be based on scientific knowledge,[21] rather than hypothetical risk, although the actual linkage need not be observable.[22]

Table B[23] specifies what conditions reveal a significant possibility of significant harm.[24] In relation to human beings once again, there will be such a possibility of harm if the amount of pollutant that a human might take in would be regarded as 'unacceptable'.[25] In order to make this assessment, the enforcing authority must rely on relevant information which is (a) scientifically-based; (b) authoritative; (c)

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[15] EPA 1990, Section 78A(2)(b).
[16] See pages 104-108.
[17] EPA 1990 Section 78A(4).
[18] DEFRA, *supra* n3, Annex 3, Table A.
[19] See pages 104-108.
[20] DEFRA, *supra* n3, Annex 3, Table A.
[21] *Ibid*, Annex 3, Para A.15.
[22] Stephen Tromans and Robert Turrall-Clarke, *Contaminated Land: The New Regime*, (London: Sweet & Maxwell, 2000) at 19.
[23] DEFRA, *supra* n3, Annex 3, Table B.
[24] See pages 104-108.
[25] DEFRA, *supra*, n3 Annex 3, Table B.

relevant; and (d) appropriate.[26] This assessment must be made with regards to the current use[27] of the land and "the authority should disregard any receptors which are not likely to be present, given the 'current use' of the land or other land which might be affected".[28]

The local authority is not entitled to determine that a site subject, *inter alia,* to PPC,[29] waste management[30] or a consent for a discharge into controlled waters is contaminated land.[31] The local authority must determine whether a site should be designated as a 'special site'.[32] This designation will take place where the site falls under one of the criteria in regulation 2 of the CL(E)R 2006. Examples include land affecting controlled waters;[33] land within a nuclear site;[34] land owned or occupied by the Secretary of State for Defence or the armed forces;[35] and land on which chemical or biological weapons have been manufactured.[36] The consequence of such a designation is that the control of special sites is then left to the Environment Agency.[37] The decision is made by the local authority, but the Environment Agency is entitled to inform the local authority of its belief that a site should be designated as a special site.[38]

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[26] *Ibid*, Annex 3, Para A.31.
[27] See also pages 118-119.
[28] DEFRA, *supra* n3, Annex 3, Para A.25.
[29] Pollution Prevention and Control - now incorporated into the environmental permitting regime, Environmental Permitting (England and Wales) Regulations 2010, S.I. 2010/675.
[30] EPA 1990, Part 2.
[31] EPA 1990, Section 78YB.
[32] EPA 1990, Section 78C.
[33] CL(E)R 2006, Regulation 2(1)(a).
[34] CL(E)R 2006, Regulation 2(1)(f).
[35] CL(E)R 2006, Regulation 2(1)(g).
[36] CL(E)R 2006, Regulation 2(1)(h).
[37] DEFRA, *supra* n3, Annex 2, Para 18.3.
[38] EPA 1990, Section 78C(4).

Once land has been identified as contaminated land, under section 78B(3), the enforcing authority, i.e. either the local authority or in the case of special sites, the Environment Agency, must give notice of the identification to anyone who appears to be an "appropriate person", to the owner of the land and to occupiers.[39] The enforcing authority must then require remediation of the contaminated land, as specified in section 78E and should serve a remediation notice on any "appropriate person".[40] If there is more than one "appropriate person", then the remediation notice must specify the proportion of remediation for which each will be responsible.[41] The CL(E)R 2006 give more detail on the content of the remediation notice.[42]

The enforcing agency may only require by way of remediation that which, bearing in mind the costs involved and the seriousness of the harm or potential harm,[43] it considers reasonable.[44] The EPA 1990 does not provide extensive guidance on this point.[45] Section 78E(4) EPA 1990 does specify that the remediation action must be reasonable, but the majority of the guidance is in Circular 01/2006[46] and over time the courts will begin to provide more assistance on what reasonable means here.[47] In practical terms, a remediation notice can require the appropriate person to take steps for assessing the levels of contamination in the land;[48] treating that contamination;[49]

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[39] See page 23-24.
[40] EPA 1990, Section 78E(1).
[41] EPA 1990, Section 78E(3).
[42] CL(E)R 2006, Regulation 4.
[43] EPA 1990, Section 78E(4)(a) and (b).
[44] EPA 1990, Section 78E(4).
[45] For more information on the "reasonableness" standard, see page 114.
[46] Section 78E(5) EPA 1990.
[47] See *R (On the application of Redland Minerals Ltd) v Secretary of State for the Environment, Food and Rural Affairs*, [2010] EWHC 913 (Admin), [2011] Env. L. R 2 where Sales J confirms that it is reasonable to demand remediation in the short term given the seriousness of the harm being caused even though there is little evidence over what a long-term approach to remediation might entail, at para 19-20 in particular.
[48] DEFRA, *supra* n3, Annex 3, Para C.65.
[49] *Ibid,* Annex 3, Para C.67.

and continuing to monitor the levels of contamination.[50] The entire sequence of these actions is referred to in the guidance as the "remediation scheme".[51] Often the remediation required will involve disrupting the pathway between a source of contamination and the receptor being harmed or at risk of harm, and the removal of the source of contamination.

The remediation notice must also be based on the standard of remediation that is to be reached under the regime.[52] The standard to which land must be remediated is that the land be "suitable for use".[53] This is the standard which would be reached by using the "best practicable technique" (BPT) for remediation[54] by removing or treating the pollutant, breaking or removing the pathway, and protecting or removing the receptor such that the land no longer meets the definition of contaminated land as outlined in section 78A under its current use. Current use is determined by the enforcing authority by reference to the planning permissions that exist over the land. The current use is any use which would be lawful under the current planning permission along with any likely informal recreational use of the land.[55]

Best practicable technique for these purposes is defined in paragraph C.19 of the Circular.[56] The enforcing authority is instructed to rely on authoritative scientific and technical advice in determining BPT.[57] This approach is very reminiscent of the

[50] *Ibid,* Annex 3, Para C.68.
[51] *Ibid,* Annex 2, Para 6.3.
[52] See pages 117-119.
[53] DEFRA, *supra* n3, Annex 3, Para C.17.
[54] *Ibid,* Annex 3, Para C.18.
[55] *Ibid,* Annex 3, Para A.26.
[56] *Ibid,* Annex 3, Para C.19.
[57] *Ibid,* Annex 3, Para C.24.

much-criticised[58] approach taken by the European Court of Justice in *Pfizer*[59] which also requires that a decision-maker ought to rely on authoritative scientific evidence, but may not do so where there is reason to believe that caution may be required (the evidence of the need for caution ought however to be based on reasonable scientific advice). In short, the test for BPT risks either demanding too little by way of remediation since the evidence for greater intervention is not sufficiently conclusive, or relying on weak scientific evidence in order to allow more thorough remediation. Some more information on BPT was however provided in *R (On the application of Redland Mineral Limited) v Secretary of State for the Environment and Rural Affairs* where Sales J made it clear there that the urgency of need for remediation at least will be one consideration that goes into determining what is BPT.[60]

Despite this, the evidence suggests that local authorities find this aspect of the regime easy to apply and helpful.[61] The approach is also confirmed by the process advocated in para C.45 of DEFRA Circular 01/2006. This states: "[i]n some instances, there may be little firm information on which to assess particular remediation actions, packages or schemes… Where this is the case, the enforcing authority should consider the effectiveness and durability which it appears likely that any such action

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[58] E.g. Caoimhin MacMaolain, "Using the precautionary principle to protect human health: Pfizer v Council" (2003) 28 *European Law Review* 723; Veerle Heyvaert, "Facing the consequences of the precautionary principle in European Community Law" (2006) 31 *European Law Review* 185; Elizabeth Fisher, "Opening Pandora's Box: Contextualizing the Precautionary Principle in the European Union" accessed at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956952 from Ellen Vos et al. (eds), *Uncertain Risks Regulated: National, EU and International Regulatory Models Compared* (Abingdon: Routledge-Cavendish, 2009).
[59] *Pfizer Animal Health SA v Council of the European Union*, T-13/99, [2002] ECR II-3305.
[60] *R (On the application fo Redland Mineral Limited) v Secretary of State for the Environment and Rural Affairs*, *supra* n47 at para 19.
[61] Environment Agency, *supra* n8 at 22 and Figure 13 page 23.

would achieve, and the practicability of its use, on the basis of information which it does have at that time".[62]

The actions required of the "appropriate person" to be carried out under a remediation notice can involve remediating land belonging to another. This means that the owner or occupier of that land for the time being will have to grant permission to the appropriate person,[63] the enforcing authority, or contractors etc to enter into and carry out works upon their land. In order to ensure that the owner/occupier of the land does this, section 78G EPA 1990 mandates that such rights be granted. It does not impose a rule of 'presumed grant' but places an obligation on the owner or occupier of land to give the appropriate permissions.[64] The section also makes provision for compensation for the owner in having to grant such rights of entry etc,[65] and requires that they be consulted before the remediation notice is served if such permission will be needed.[66]

This begs the question as to who is the "appropriate person" on whom the enforcing authority must serve the remediation notice. Under section 78F EPA 1990 the "appropriate person" will primarily be the person who caused or knowingly permitted the substance in question to be in, under or on the land[67] (Class A persons). If such a person cannot be found after reasonable enquiry, the owner or occupier of the land for the time being[68] (Class B persons) will be the appropriate person. There can be more than one appropriate person. The enforcing agency, under section 78G

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[62] DEFRA, *supra* n3, Annex 3, Para C.45.
[63] See also pages 111-113.
[64] EPA 1990, Section 78G(2).
[65] EPA 1990, Section 78G(5).
[66] EPA 1990, Section 78G(3).
[67] EPA 1990, Section 78F(2).
[68] EPA 1990, Section 78F(4).

EPA 1990, must use reasonable endeavours to consult every person who is the owner of occupier of the land and must also make reasonable endeavours to consult the person on whom the notice is to be served before the notice is served.[69] This obligation does not apply where the enforcing authority considers that serious harm may result imminently if consultation were to take place.[70]

Under section 78L EPA 1990 the person on whom a remediation notice is served may appeal against the notice within 21 days. This appeal will be made to the Magistrates' Court if the notice was served by a local authority, and to the Secretary of State where the notice was served by the Environment Agency.[71] The appellate authority must quash the notice if there is a material defect in it,[72] but is authorised otherwise to confirm with or without modification, or to quash the notice. The grounds of appeal include a failure to take account of the guidance;[73] that the land is unreasonably identified as being contaminated land;[74] that the person is unreasonably identified as an "appropriate person";[75] that there was a failure to identify that another person was an "appropriate person";[76] and that the proportion of costs left to the person to bear was unreasonable.[77] If an appeal is not successful, or if no appeal is brought, it will then become an offence for the person on whom the remediation notice is served to fail to comply with that notice.[78]

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[69] See also pages 123-129.
[70] EPA 1990, Section 78G(4).
[71] EPA 1990, Section 78L(1).
[72] EPA 1990, Section 78L(2)(a).
[73] CL(E)R 2006, Regulation 7(1)(a)(i).
[74] CL(E)R 2006, Regulation7(1)(a)(ii).
[75] CL(E)R 2006, Regulation7(1)(c).
[76] CL(E)R 2006, Regulation 7(1)(d).
[77] CL(E)R 2006, Regulation 7(1)(f)(ii).
[78] EPA 1990, Section 78M.

The penalty for such a failure will be a fine.[79] The enforcing authority can also bring High Court proceedings if it appears that the fine will be an insufficient sanction[80] and will not ensure that the remediation takes place.[81] The remediation notice may contain within it continuing monitoring obligations as far as the initial pollution linkage is concerned, and remediation may take considerable time to complete. Once land is remediated, it is no longer considered to be contaminated land and the provisions of the regime no longer come into play in relation to that land. If there is a change of use however, the land may become contaminated again since new pathways or receptors may well be introduced onto the land as a result of the change in use.

In practice the regime described here operates as a fallback provision for local authorities to rely on in cases where the landowner is not looking to change the use or develop his land. Local authorities tend to rely on other powers to ensure remediation, primarily through the planning system.[82] Local authorities impose conditions of remediation onto developers when granting planning permission. By 2007 local authorities had surveyed only an estimated 10% of their land at an estimated cost of £30 million.[83] 781 sites had been designated as contaminated with 145 having been completely remediated by the time of the report.[84] Additionally, local authorities have tended to avoid placing costs onto the owners of land (unless the owner is responsible for the contamination) and have instead paid for the

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[79] *Ibid.*
[80] EPA 1990, Section 78M(5).
[81] See also page 132.
[82] Environment Agency, *supra* n8 at 6, Figure 1. See also United Kingdom, DEFRA, "Public Consultation on Changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990" (London, 2010) at paragraph 28.
[83] Environment Agency, *supra* n8 at 3.
[84] *Ibid* at 14.

remediation themselves. In England, full recovery from a Class B person was made in relation to only 5 sites, and in Wales no such total recovery from a Class B person has been reported.[85] This has curtailed the ability of local authorities to tackle more sites.[86]

The regime therefore appears slow, costly, and to have achieved little. Certainly there is some truth in this criticism,[87] but, as this paper hopes to show, this lack of progress is partly due to the prevalence of voluntary remediation (which may of course be prompted by the existence of the regime[88]), but is also due to a misinterpretation of the regime. It is suggested that the regime does not need to be changed in order to achieve its aims more quickly and completely- it simply needs to be reinterpreted. As things stand, the liability of owners of land is not a practical reality. This does not need to be the case.

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[85] *Ibid* at 21.
[86] See also pages 143-148.
[87] Stephen Vaughan, "The Contaminated Land Regime: Still Suitable for Use?" [2010] *Journal of Planning Law* 142 at 142.
[88] *Ibid* at 148. See also Michael Purdue, "The relationship between development control and specialist pollution controls: which is the tail and which is the dog?" [1999] *Journal of Planning Law* 585 at 591.

III: Why Look at the Contaminated Land Regime from the Perspective of Stewardship?

Before looking in more detail at the specifics of the contaminated land provisions and stewardship, it is necessary to demonstrate why it is worth looking at the regime in the light of stewardship at all. What is the link between the provisions and stewardship that justify the focus of this paper? Stewardship can be roughly described as being characterised by a responsibility to manage the state of land for the benefit, at least in part, of future generations. There are four key reasons why it is appropriate to consider the regime in relation to stewardship. Firstly, it is one of the expressed aims of the regime to manage the state of land for the benefit of future generations; secondly, the regime plays a specific function within the wider framework of regulation concerned with the state of land; thirdly, this is an element of land regulation which is often overlooked in literature discussing the place of stewardship within English law; and finally, the regime currently suffers for a lack of judicial guidance and interpretation and so it will be beneficial to have a guide to interpreting the regime provided by clarification of the background philosophy.

(a) The aim of the regime

The contaminated land regime, like most regulation, has a range of objectives. It aims to solve the historical problem of land contamination; to bring back into use land which is currently unusable; to ensure economically sustainable decontamination; and to manage the state of land for the future in conjunction with

other controls.[89] DEFRA describes the main aim of the regime as being "to help address the problem of historical contamination of land and the risks it can pose to people's health and the environment".[90] This paper will however focus on the final aim of improving the state of land for the future. This aim demonstrates that the contaminated land provisions are not simply focussed on solving this historical problem, but are instead looking to also manage the state of land for future generations by ensuring that we do not pass on land in the contaminated state in which we receive it.

The contaminated land provisions were introduced on the back of a government consultation paper, "Paying for our Past".[91] The title alone indicates that the provisions were seen as not only as tackling historical pollution, but also as embodying a moral responsibility to make amends for the acts of previous generations. In fact, the consultation paper was launched as a response to the perceived short-comings in the system of registers that formed part of the EPA 1990[92] and in the common law as exemplified by *Cambridge Water Company v Eastern Counties Leather Plc.*[93] In this case Lord Goff highlighted the moral duty to clean up land. He argued that, "the protection and preservation of the environment is now perceived as being of crucial importance to the future of mankind"[94] and

[89] United Kingdom, DEFRA, "The Environmental Protection Act: Part IIA- Contaminated Land", Circular 01/2006, (London: 2006), Annex 1, Para 7.
[90] United Kingdom, DEFRA, "Guidance on the Legal Definition of Contaminated Land" (London: HMSO 2008) at Para 1.
[91] United Kingdom, Department of the Environment and Welsh Office, "Paying for Our Past" (London: 1994).
[92] For more information on the system of registers see pages 16-17.
[93] [1994] 2 A.C 264.
[94] [1994] 2 A.C. 264 at 305.

highlighted that the common law may not be able to adapt sufficiently to enforce the obligation. He called for legislation to step in to enforce this moral duty.[95]

More than a duty to maintain the land, this moral responsibility is also an express responsibility to manage land. The landowner must go beyond maintenance to take active steps to ensure that his management meets his obligations. According to Goldstein, the steward is "not merely a caretaker".[96] One aim then of the provisions is to manage the state of land for the future. The justification for imposing such liability is phrased in terms of debts. The moral responsibility encapsulated in "Paying for our Past" was both the aim and justification for action.

A similar tone is to be found in the statements made to the House of Commons by the sponsor of the Environment Bill. John Gummer,[97] in two telling comments made on the 18th April 1995, argued: "[i]t is our responsibility not to lay similar costs on future generations if we are to proceed with the growth which all of us want to achieve today",[98] and again: "[t]hat is because we are concerned not just for this generation, but for future generations. Our concept [is] of continuity and of passing on to the next generation something better than we have received in the past".[99] The rhetoric of stewardship is used to explain and justify the imposition of liability.

As a result, Class B persons, owners or occupiers of the land for the time being, who did not cause or knowingly permit a contaminating substance to enter onto or under the land, can, and arguably should, be held responsible for its clean up if the logic of

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[95] *Ibid*.
[96] Robert J Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks* (Aldershot: Ashgate, 2004) at 96.
[97] The then Secretary of State for the Environment.
[98] John Gummer, House of Commons Hansard, 18/04/1995, Volume no. 258, Col 36.
[99] *Ibid* at Col 48.

this moral duty is pursued. The fact that this aspect of the regime is as yet underused does not alter the existence of the moral responsibility. The regime is presented in these statements as going beyond simply solving a practical problem of contaminated land. It is presented as being the embodiment of the obligation to develop with a view to the future. This is summed up on the DEFRA website: "The Government's long-term aim is to work towards a future where all the contaminated land in England has been identified and dealt with".[100]

The Guidance too embodies elements of this idea of responsibility to manage land for current, and, crucially, future owners. "Contaminated land is an archetypal example of our failure in the past to move towards sustainable development. We must learn from that failure. The first priority for the Government's policy on land contamination is therefore to prevent the creation of new contamination".[101] The second priority is to clean up the existing contamination.[102] This ordering of priorities demonstrates that part of the philosophy of the regime lies in not causing any more problems for future generations and improving the current state of land for their benefit.

Lee has argued that, "[c]ontaminated land is presented as predominantly a problem of historic pollution".[103] The guidance, she argues, demonstrates that the main aim is to address the problem of historical contamination and the risks this poses to human health. Whilst it is true that the target of the regulation will be land which is historically contaminated, this does not mean that the only aim of the regime is

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[100] United Kingdom, DEFRA, viewed 23rd Sept. 2010 <http://www.defra.gov.uk/environment/quality/land/contaminated/>.
[101] DEFRA, *supra* n89, Annex 1, Para 2.
[102] *Ibid*, Annex 1, Para 4.
[103] Maria Lee, "'New' environmental liabilities: the purpose and scope of the contaminated land regime and the Environmental Liability Directive" (2009) 11 *Environmental Law Review* 264 at 265.

simply to solve an old problem. It is also to solve this problem with a view to improving the state of land for the future as the Government's 'primary' objectives identified by Lee demonstrate. These are: "(a) the identify and remove unacceptable risks to human health and the environment; (b) to seek to bring damaged land back into beneficial use; and (c) to seek to ensure that the cost burdens faced by individuals, companies and society as a whole are proportionate, manageable and economically sustainable".[104] The second of these goes to the temporal aims of the regime and it is clear that the aim is not simply one of bringing land into use for the present. The contaminated land provisions are not simply concerned that land is currently in an acceptable condition, although as has been admitted, this is the central focus of the regime. The regime is also concerned to ensure that future generations are not saddled with the problem of historical contamination.

It is argued here that is important to discover whether this 'moral responsibility' to future generations, relied upon in the pre-legislation documentation, and the statutory guidance, is simply political rhetoric. It goes without saying that some of those involved in drafting the provisions may not have had "stewardship" explicitly in mind. The question is whether there is a genuine aim in this regime to look to the future.

It is suggested that the answer to this question is to be found in the shape of the regime. The regime does not seek only to bring back into use land of which is of economic worth. The test for intervention is one of possibility of harm, not of the extent of the economic benefit that remediating the land would bring.[105] The

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[104] DEFRA, *supra* n89, Annex 1, Para 7 quoted in Maria Lee, *supra* n96 at 267.
[105] *Ibid*, Annex 3, Table A.

economic analysis that goes into the reasonableness of the remediation may take account of the benefit that remediation may bring, but the question is, at its heart, about whether it is reasonable to demand[106] that the "appropriate person" carry out the particular steps involved in cleaning up the land, not whether this land should be remediated. There is no discretion on the enforcing authority over this latter question. There is an obligation on the enforcing authority that all contaminated land within the definition in section 78A(9) EPA 1990 be remediated.[107]

Furthermore, the regime does not simply look to one moment in time, even though admittedly the regime's primary focus is on the present. It does not ask only whether we need to clean up the land now, but also whether the land needs to be cleaned up for the benefit of the future. This, it is suggested, is enough to demonstrate that the references to the future are not simply rhetorical flourishes designed to make the ambitious[108] aspects of the regime seem more palatable. The look to the future may be limited, but it is there, and this should be acknowledged. Examining how far the contaminated land provisions are able to meet this objective, whilst also being an enforceable and practical regime, is worthwhile. In turn this may tell us much about regulating on the basis of the principles of stewardship. Thus looking at the contaminated land provisions on the basis that the aim expressed to motivate their enactment is truly the aim of the provisions, is a useful exercise.

(b) The place of the regime within the framework of "state of land" regulation

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[106] See also page 114.
[107] EPA 1990, Section 78E.
[108] Maria Lee, *supra* n105 at 278.

The expressed aim of the regime does therefore justify the focus of this paper. Similarly, the function the regime performs explains why it is worth looking at the regime in the light of stewardship. The regime performs a critical role in ensuring that land is in an acceptable state for the future. There are two key objectives involved in ensuring this- the first (which is achieved through pollution controls[109] and waste management controls[110]) is that land is not made any 'worse'. The second is that land which is currently polluted should be cleaned up.

As the Environment Agency highlights, "[l]and affected by contamination can be a blight on communities and may present unacceptable risks to human health and the environment. Preventing our land becoming polluted is the best way of making sure that future generations do not inherit a legacy of contamination. However, today we all face the challenge of dealing with contamination caused by pollution in the past".[111] These planks are equally important. The contaminated land regime achieves this second aspect and "sweeps up harm unaddressed by other regulation".[112] When this is understood, it is no surprise that the regime asks whether land is contaminated now, in the present, since it is this land that must be cleaned up as part of this second plank. This focus on present contamination does not mean that the regime as a whole is not looking also to manage the state of land for the future.

Crucially, it is in fact one of the few regimes that are proactive, rather than reactive, in performing this role and as such is central to the overall picture of state of land

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[109] Environmental Permitting (England and Wales) Regulations 2010 S.I. 2010/675. See also, <http://ww2.defra.gov.uk/environment/quality/permitting/> viewed 10/12/10.
[110] Waste Framework Directive, 2008/98/EC. See also, <http://ww2.defra.gov.uk/environment/economy/waste/> viewed 10/12/10 and Eloise Scotford, "The New Waste Directive - Trying to Do it All… An Early Assessment" (2009) 11 *Environmental Law Review* 75.
[111] United Kingdom, Environment Agency, "Reporting the Evidence" (Bristol: 2009) at 1.
[112] Maria Lee, *supra* n105 at 265.

regulation. (Statutory nuisance too imposes a proactive obligation on local authorities.[113]) Planning controls currently do account for the bulk of remediation of land (Lee highlights that the local authority estimate is that only 10% of contaminated land remediation is addressed under the EPA 1990)[114] but whilst they are certainly a very important part of ensuring that land is cleaned up, they come into play only when a landowner is seeking to develop a parcel of land. Planning is a voluntary regime and as such operates very differently to the contaminated land provisions. The planning controls represent a compromise between the interests of the local authority and the developer. There is no power on the local authority to force the developer to remediate land if the developer simply accepts that he will not obtain planning permission.

The contaminated land provisions can come into play not only where the owner of the land seeks to change its use or build upon it, but also where nothing happens to the land at all. They lie apart from planning controls. This is why the contaminated land provisions are so important and ambitious. They do not rely on the developer 'bringing the land to the attention' of the local authority, nor do they rely on private individuals such as neighbours being affected by the state of the land, as in nuisance. Instead, they impose a duty on the local authority to inspect land, to find contaminated land, and to require its remediation. The contaminated land regime fills a crucial gap in ensuring that land is in a good state for future generations.

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[113] EPA 1990, Section 79(1).
[114] Maria Lee, *supra* n105 at 276.

(c) State of the existing literature

The third reason why it is appropriate to discuss stewardship in relation to contaminated land here is that this regulation has to date received little attention in the literature discussing the place of stewardship within English law. Specifically, although understandably given both their individual projects, and the date at which they were writing, neither Rodgers, nor Lucy and Mitchell, in their articles discussing stewardship in relation to environmental regulation in English law mention contaminated land. Rodgers looks primarily at the Countryside and Rights of Way Act 2000 (CROWA), the Wildlife Enhancement Scheme and the Rural Development Regulation when asking, "how do we characterize the nature of private property where environmental stewardship obligations have been imposed by modern environmental legislation".[115] This reflects his primary project of examining stewardship within the rural scene and agricultural regulation. In another article he looks too at the Wildlife and Countryside Act 1981, the Common Agricultural Policy, planning controls, and the position in relation to commons when examining the case for and practicality of introducing duties of environmental stewardship. It is especially interesting to note that in this article, Rodgers draws on the 'suitable for use' criterion which forms part of the contaminated land regime as a potential mechanism to "incorporate an explicit recognition of a basic responsibility of

[115] Christopher Rodgers, "Nature's Place? Property Rights, Property Rules and Environmental Stewardship" (2009) 68 *Cambridge Law Journal* 550 at 552.

environmental stewardship as an integral component of property entitlement rules at common law".[116]

Lucy and Mitchell by contrast look at sections 226-231 Town and Country Planning Act 1990, Airports Authority Act 1975, Civil Aviation Act 1982, Electricity Act 1947, the Leasehold Reform Act 1967 and the Landlord and Tenant Act 1987 as exemplifying restrictions on private property.[117] Their article does not look specifically at environmental legislation and even if it did they were writing before the contaminated land provisions came into force. Thus although the literature discussing the place of stewardship in English law contains discussion of many regimes, there is no discussion of the challenge to private property from regulatory intervention through the contaminated land provisions.

It is suggested that this omission from the literature should be remedied. The contaminated land regime aims to achieve clean land for the future. Even if the contaminated land regime does not succeed in its aim, or if the inevitable compromises that arise through the necessity of drafting regulations in a certain and enforceable manner override the aims of stewardship, there is benefit in looking at stewardship and the contaminated land regime in conjunction. The exercise, it is hoped, will reveal something about contaminated land and something about regulating on the basis of principles of stewardship. This paper does not attempt to argue that stewardship is a better way to regulate land use. Rather it comes from the point of view that recognizing that stewardship underlies the contaminated land

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[116] Christopher Rogers, "Property rights, land use and the rural environment: A case for reform" (2009) 26S *Land Use Policy* S134 at S139.
[117] William Lucy and Catherine Mitchell, "Replacing Private Property: the Case for Stewardship" (1996) 55 *Cambridge Law Journal* 566 at 571-572.

regime allows a better understanding of the complexities within the provisions and of why the regime is drafted as it is.

(d) The current approach to interpretation and application

Finally then it is important from a practical perspective also to determine what the underlying philosophy behind the regime is. The reason for this is that the regime suffers from a lack of guidance on how to interpret and apply it. The official published guidance does help in this regard, but local authorities struggle with the regime[118] and there are very few judicial decisions to assist them although some recent decisions have provided more guidance on the regime in practice.[119] At the time of Vaughan's survey, only three decisions on the regime had reached the higher courts.[120]

Today the number is five but these cases have tended to be narrow in their focus with few judicial comments on the wider regime and its place within the framework of state of land legislation. As Vaughan comments, "The lack of engagement with Pt 2A by the House of Lords in the *National Grid Gas* decision and by the High Court in *Circular Facilities* has meant that we have little in way of clear judicial guidance on certain of the key terms used in the regime".[121] It is suggested that an examination

[118] Environment Agency, *supra* n111.
[119] *R. (on the application of Redland Minerals Ltd) v Secretary of State for Environment, Food and Rural Affairs* [2010] EWHC 913 (Admin); [2011] Env. L.R. 2; *R. (on the application of Crest Nicholson Residential Ltd) v Secretary of State for the Environment, Food and Rural Affairs*, [2010] EWHC 561 (Admin); [2011] Env. L. R. 1.
[120] Stephen Vaughan, "The Contaminated Land Regime- Still Suitable for Use?" [2010] *Journal of Planning Law* 142 at 148.
[121] *Ibid* at 154.

of the underlying philosophy and aim of the regime, and an explanation of why certain features of the regime as are they are, will be practically useful.[122]

Furthermore, in both *National Grid Gas*[123] and *Circular Facilities*[124] the main question asked was concerned with the liability of potential Class A persons. The approaches in the two cases can however be contrasted in terms of their overall approach to the regime. *National Grid Gas*, as will be seen in detail below, was concerned not to extend liability as a Class A person to statutory successors to the original polluter. This conclusion was motivated, at least in part, by a desire to ensure that shareholders in such companies were not saddled with the costs of liability. *Circular Facilities*, by contrast, suggests scope for a broader approach when attributing knowledge to a person to bring them within the scope of the Class A test. Although the case is at its heart about interpretation of evidence it does acknowledge that the key problem here is attempting to assess facts that arose 20 years before but that the key question is simply whether the person knew of the existence of the contaminating substance and did nothing about it- not whether he knew that harm was or may be caused by this substance.[125]

Whilst there is no doubt that the key difference between the two cases is one of the question being asked, and both do share a strict interpretation of the language of the provisions, there does seem to be some conflict between their approaches to the polluter pays principle, what it means, and how it fits into this regime. It demonstrates a lack of clear engagement with the underlying principles that go into

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[122] See pages 143-148.
[123] *R (National Grid Gas) v Environment Agency* [2007] UKHL 30, [2007] 1 W.L.R. 1780.
[124] *Circular Facilities (London) Ltd v Sevenoaks DC* [2005] EWHC 865, [2005] Env. L.R. 35.
[125] *Ibid* at para 43.

this regime and as such demonstrate the wider need for further engagement with the philosophy behind its enactment. Whilst this thesis does not address the interpretation of the polluter pays principle directly, the lack of consistency in the underlying policies behind the regime is the central theme of this paper. The courts are not engaging with the regime and so it is difficult to interpret it as effectively as possible. It is hoped that the interpretation of the regime advocated here will assist the courts in applying the regime.

IV: What is stewardship?

Stewardship is both an ethical concept[126] and a legal principle. The relationship between the ethical concept and the legal one is complex. In law, the steward started life as a land agent,[127] although the principles of the ethical concept of stewardship are represented in many legal systems.[128] As an ethical concept it has a number of justifications,[129] and, of course, the precise meaning to be attributed to stewardship will depend on which justification is adopted. This paper will begin by examining the ethical concept since this allows a deeper understanding of the meaning of stewardship. There will then be a detailed discussion of the role of stewardship in law, and how it interacts in law with other, perhaps more familiar, concepts. It will be possible to distil from this discussion a number of 'hallmarks of stewardship'. These characteristics will be the elements that form legal regulation based on a principle of stewardship.

(a) Stewardship as an ethical principle

As an ethical principle, stewardship has a long history, and it is therefore difficult to generalise about its meaning. Despite this, this paper will attempt to outline a relatively uncontroversial definition of stewardship and will look at environmental stewardship in particular. It will then briefly outline the different justifications for the

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[126] Lynton K Caldwell, "Rights of Ownership or Rights of Use? - The Need for a New Conceptual Basis for Land Use Policy" (1973-1974) 15 *William and Mary Law Review* 759 at 767.
[127] See pages 65-67.
[128] See pages 65-68.
[129] See pages 46-58.

stewardship ethic in order to explore more fully how we ought to understand stewardship.

(1) Definition of the ethical principle of stewardship

(a) Stewardship generally

As highlighted above, it is difficult to set out an uncontroversial definition of stewardship as an ethical principle. The main problem lies in giving enough content to the principle to make it a meaningful guide to conduct whilst remaining sufficiently general. The definition given by Welchman demonstrates this problem. "To be a steward is to devote a substantial percentage of one's thoughts and efforts to maintaining or enhancing the condition of some thing(s) or person(s), not primarily for the steward's own sake".[130] This definition attempts to state the general thrust of stewardship, but fails to highlight what is distinctive about stewardship as an ethical principle. It is not simply that the steward will act with something in mind other than his own interests, but that the steward will also be answerable (or in some versions, accountable) for his actions in "maintaining or enhancing" the thing.

Stewardship must contain within it some notion of enforceable responsibility, be that, in secular versions of the principle, accountability to the people or state, or in non-secular versions, to God. It is only by acknowledging that the true steward must justify himself to others that the operation of stewardship can be understood. In the non-secular stewardship model, man, as a whole, and each person individually, is responsible to God for their actions as steward. Attfield highlights that, "[w]hatever our laws may say about property… humans do not own the Earth… but hold or

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[130] Jennifer Welchman, "The Virtues of Stewardship" (1999) 21 *Environmental Ethics* 411 at 415.

possess [it] on a provisional basis hence their answerability".[131] It is this answerability in Attfield's account that is the essence of stewardship.

In secular versions too the steward is accountable and will be responsible to the state, the people generally, or to a specific person for their actions. This is an essential element of stewardship and one which forms a very important aspect of the argument presented here.[132] Attfield highlights the accountability of the steward, not only to religious stewardship, but also to secular stewardship.[133] Stewardship entails answerability precisely because the owner of property is not able to use this property in any way he desires. The key to a trust is the enforceability of the trust obligation, the duty to account. The same can be said for stewardship. This analogy between the trust and stewardship will be discussed in more detail below,[134] but in terms of the definition of stewardship it is enough to note that the analogy brings us as far as allowing us to conclude that as with the trust, there should be some duty to account as part of the notion of stewardship. For this reason the definition given by Welchman will be adapted here to include this element of sanction for the moral failure to comply with the obligations of stewardship. A steward must manage or enhance something for someone or something else and will be answerable for any failure to do so. As will become apparent, this definition also links very closely with how stewardship has developed as a legal principle.

(b) Environmental stewardship

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[131] Robin Attfield, *The Ethics of the Global Environment* (Edinburgh: Edinburgh University Press, 1999) at 45.
[132] For more detail on the answerability aspect of the ethical principle of stewardship see 61-65.
[133] Robin Attfield, *supra* n131 at 45.
[134] See pages 69-71.

There are considered to be different strands of stewardship as an ethical concept- agricultural stewardship, stewardship of historical and cultural artefacts, and more crucially for our purposes, environmental stewardship. Although each of these focuses on the key idea of an obligation to manage for the benefit of others, the content of the obligation will vary from context to context. In addition, the 'others' for whom one must manage the property will also vary depending on the strand of stewardship being examined. This paper is concerned with environmental stewardship, which is widely accepted as being one of the key ethical motivations behind protection of the environment.[135]

A useful definition with which to commence our discussion is that adopted by the United States Environmental Protection Agency. "We define environmental stewardship as the responsibility for environmental quality shared by all those whose actions affect the environment… It is also a behavior, one demonstrated through continuous improvement of environmental performance, and a commitment to efficient use of natural resources, protection of ecosystems, and, where applicable, ensuring a baseline of compliance with environmental requirements".[136] This definition is useful because it is relatively specific and highlights a number of important features of environmental stewardship. This definition, although detailed, fails however to mention the aspect of answerability outlined above, missing one of the crucial aspects of stewardship.

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[135] Christopher Barrett and Ray Grizzle, "A Holistic Approach to Sustainability Based on Pluralism Stewardship" (1999) 21 *Environmental Ethics* 23 at 35.
[136] United States, Environmental Protection Agency, "Everyday choices: Opportunities for Environmental Stewardship" (Washington: 2005) at 2.

It does however emphasise an important issue regarding environmental stewardship. The term "stewardship" describes responsibilities and the behaviour of the steward when meeting his responsibilities. The principle of stewardship is a guide to behaviour- it tells us how we should behave. In addition, it is used to describe our behaviour when we do act in this way. As a result, when examining discussions of stewardship, it is important always to distinguish between the norm, "one should behave according to the principle of stewardship" and the description, "he is behaving as a steward". This distinction is crucial when asking the question, "who is the steward" since this could mean either, "who should act according to the principles of stewardship" and "who is acting according to these principles". This paper will focus on the first sense. This is really the core meaning of stewardship. Stewardship is an ethical principle that dictates appropriate forms of conduct. Stewardship is the responsibility to act for the benefit of something or someone else when managing natural resources with some kind of sanction when the responsibility is not complied with. Our definition of environmental stewardship then is a definition of what the ethical principle of stewardship demands in relation to the environment.

This definition raises the question as to what obligations this responsibility entails. We know that stewardship requires management of property for the benefit of others, but we must ask, firstly, what is meant by the management of property in this context, and secondly, who the "others" are. These two issues really must be addressed together in order to determine what obligations would be characteristic of a system of stewardship. Lucy and Mitchell describe "the hallmark of stewardship [as] land holding subject to responsibilities of careful use, rather than extensive

rights to exclude, control and alienate that are characteristic of private property".[137] They therefore focus on the notion of careful use. Caldwell describes an additional element which is essential to a stewardship system: "ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present".[138]

The obligation is therefore not only to use the land carefully, but also to manage the land with a view to benefitting future generations, even where this conflicts with the steward's present needs. Lucy and Mitchell, in not relying on the interests of future generations in their definition, may well avoid some of the difficulties of regulating on the basis of stewardship which are discussed below,[139] but their account, as with Welchman[140], fails to demonstrate what is distinctive about stewardship. It is the mixture of right and obligation with a view to the future that is central to the notion of environmental stewardship. Stewardship is about more than ensuring that the earth's resources are not depleted- it is also about ensuring that land is in a certain state and as such can be used to tackle pollution and contamination, as well as overuse. In order to understand this general definition more fully it is necessary to examine the justifications said to be behind this ethical principle. Why is there an obligation to manage property for the benefit of future generations?

(2) Justifications for the ethical principle of stewardship

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[137] William Lucy and Catherine Mitchell, "Replacing Private Property- the Case for Stewardship" (1996) 55 *Cambridge Law Journal* 566 at 584.
[138] Lynton K Caldwell, *supra* n126 at 766. For more on the relationship between stewardship and trusts see pages 69-71.
[139] See pages 134-142.
[140] See page 41 and n130.

There are many potential justifications for the ethic of stewardship, and these justifications can lead to conflicting formulations of the content of the obligation. This paper will discuss some of these different justifications, not to determine which is the most coherent or satisfactory in terms of explaining stewardship, but in order to try to highlight some common features which allows us to adopt a general definition of stewardship. This approach, like that of Barrett and Grizzle[141], is pluralistic, and demonstrates that it is possible to believe that stewardship as a guide to conduct can be justified without fully committing oneself to one particular strand of justification. This is not to say that any of the justifications given are perfect, nor is there space here to fully convince that stewardship is indeed justified. Instead, it will be shown that there are some potentially strong justifications for stewardship, certainly enough to allow us to proceed. The justifications examined here will be, firstly, secular justifications based on ideas of justice and ecology, and then, secondly, religious justifications. This discussion will attempt to show that the definition of stewardship adopted here is sufficiently general to allow those of many different perspectives to acknowledge that we should act according to this principle.

(a) Intergenerational Justice

Firstly, many see stewardship as based on the moral duties associated with intergenerational equity. Brown Weiss takes this approach arguing that, "[a]s members of the present generation, we hold the earth in trust for future generations. At the same time, we are beneficiaries entitled to use and benefit from it".[142] Attfield

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[141] Christopher Barrett and Ray Grizzle*, supra* n135.
[142] Edith Brown Weiss, "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 *American Journal of International Law* 198 at 199. See also pages 69-71.

too relies on an intergenerational justification for stewardship, but gives more details as to the content of the resulting obligations. "Current agents, to the extent that they have the necessary powers and resources, have obligations to provide for the satisfaction of the basic needs of future generations, and to facilitate the development in the future of characteristic human capacities… that such satisfactions and development can foreseeably be facilitated".[143]

He argues that the ethical justification for the principle "supplies a substantive content to trusteeship".[144] The obligation that he thus associates with intergenerational justice is an obligation not only to allow the basic needs of future generations to flourish, i.e. through permitting food production and maintaining water supplies, but also to develop distinctively human characteristics. Arguably this implies that the stewardship duty could include maintaining the aesthetic value of areas of natural beauty to promote artistic and literary endeavours, or the protection of buildings of special historical value to promote learning.

Brown Weiss too advocates this approach as it allows a wealth and depth of cultural and ecological heritage.[145] She outlines three principles of intergenerational justice which support the principles of stewardship. Firstly, each generation will fall under an obligation to preserve the "diversity of the natural and cultural resource base";[146] secondly, each generation must keep the planet in a good state such that it is passed on in "no worse a condition than that in which it was received";[147] and thirdly, each generation must ensure that future generations have access to the "legacy of past

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[143] Robin Attfield, *supra* n131 at 157.
[144] *Ibid* at 162.
[145] Edith Brown Weiss, *supra* n142 at 202.
[146] *Ibid* at 201-202.
[147] *Ibid* at 202.

generations".[148] The scope of this definition of intergenerational justice, and of the stewardship obligation that it engenders, are wider than environmental protection, and extends into a justification for preservation of the total range of sensory and intellectual sources that each generation has the privilege to enjoy. It includes within it a crucial focus on the state of the planet and its resources. In short, each generation must manage its resources in such a way that will not harm or prevent the flourishing of, future generations.

This definition of intergenerational justice demonstrates why this is the predominant secular justification for environmental stewardship. According to Rawls, "the correct principle is that which the members of any generation (and so all generations) would adopt as the one their generation is to follow and as the principle they would want preceding generations to have followed (and later generations to follow), no matter how far back (or forward) in time".[149] Stewardship which concerns itself with management of natural resources fits into this pattern of acting from the 'position of ignorance'.

This Rawlsian understanding of justice does however seem to ignore the potential ecological, rather than anthropological, benefits of stewardship. This is a popular comment on the stewardship approach that relies on Rawls. Barry for example sees "long-sighted anthropocentrism [as]… a key aspect of ecological stewardship".[150] Goldstein too focuses on the anthropocentric moral justification for the principle: "[s]tewardship is about benefitting society, but it includes future generations within

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[148] *Ibid*.
[149] John Rawls, *Political Liberalism, Expanded Edition* (Chichester: Columbia University Press, 2005) at 274.
[150] John Barry, *Rethinking Green Politics* (London: Sage Publications, 1999) at 152.

that zone of protection".[151] These views exclude the protection of natural interests for their own sake.

This focus on the needs and wants of man has often been used as a criticism of stewardship.[152] Even from a purely anthropocentric perspective however there are difficulties with the approach which looks to the balance of rights and obligations between generations and whilst it is not possible to examine the nature of this controversy in detail here, it is necessary to outline the difficulties with an "intergenerational justice" explanation of stewardship. There is considerable controversy, despite the fact that the justification for stewardship is the promotion of the interests of future human beings, as to whether future generations are in fact capable of holding 'rights' which are enforced through these obligations.[153] This difficulty is significant for the question of the nature of the obligation that rests on the steward. It will be seen below that it is perhaps not necessary to 'ground' obligations in a corresponding right.[154] Here, this paper will not attempt to prove that future generations can have rights, but simply to suggest some answers to this difficulty.

It certainly is problematic to state that future generations have rights in the present since they do not yet exist nor can we know who or how many will make up the sum of these future generations. This argument is often presented as a stumbling block to

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[151] Robert J Goldstein, *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks* (Aldershot: Ashgate, 2004) at 96.
[152] Robin Attfield, *supra* n131, Chapter 3.
[153] Lukas Meyer, "Intergenerational Justice" viewed 28th Sept. 2010 <http://plato.stanford.edu/entries/justice-intergenerational/>.
[154] See also pages 109-121.

our having obligations owed to future generations.[155] Thus White presents the argument that, "it is... a fallacy to argue, as is commonly done, that because a certain class of things, whether… the environment… generations yet to come… is capable of having, or actually has something in its interests, therefore it is capable of having a right".[156] Interests, he highlights, are not enough to ground rights.

There are however answers to this problem. Firstly it is possible to conclude, as White does, that interests are neither sufficient nor necessary to the founding of rights: persons, he argues, whether born or not, are capable of having rights simply by virtue of their being persons.[157] Similarly, Warren, when discussing the rights of persons who will never be born, discusses the position in relation to future generations and concludes that "to say that merely potential people are not the sort of things which can possible have moral rights is by no means to imply that we can have no obligations toward people of future generations, or that they (will) have no rights that can be violated by things which we do now"[158] precisely because as fellow human beings we should treat them as we would want to be treated.

The second potential solution to this difficulty is suggested by Hoerster. He argues that "we can safely assume, first, that future people will be bearers of rights in the future, second, that the rights they have will be determined by the interests they have then, and third, that our present actions and policies can affect their interests. If we can violate a person's rights by frustrating her interests severely, and if we can so

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[155] Richard De George, "The Environment, Rights, and Future Generations" and Ruth Macklin, "Can Future Generations be Said to Have Rights" both in Ernest Partridge, *Responsibilities to Future Generations: Environmental Ethics* (New York: Prometheus Books, 1981) cited in Lukas Meyer *supra* n142.
[156] Alan R White, *Rights* (Oxford: Clarendon Press 1984) at 80.
[157] *Ibid* at 90.
[158] Mary Anne Warren, "Do Potential People Have Moral Rights" (1977) 7 *Canadian Journal of Philosophy* 275 at 288.

severely frustrate such interests of future people, we can violate their future rights".[159] As a result it is theoretically possible to ground an obligation (the corollary of a right[160] under some characterisations of obligation[161]) in the notion of intergenerational justice. If either of these explanations can ground rights in future generations, then we can conclude that this could give rise to a corresponding obligation on us.[162] It is not necessary however to conclude that this is possible, as will be seen below,[163] in order to justify the stewardship obligation, even one based on intergenerational justice. This is because obligations need not necessarily be grounded in rights.[164] The argument presented here, i.e. that future generations do have rights, is however a justification for the ensuing obligation. The content and nature of this obligation is discussed below.[165]

(b) Ecocentric and ecological justifications

Stewardship is also seen as being linked with the principles of ecology, despite the focus on human interest apparent in theories of intergenerational equity. Goldstein argues that stewardship "gives us a legally cognizable obligation, based on ecology and interpreted using the principles of environmental ethics".[166] The ethics of ecology stipulate that the natural world should be seen as a single system within which one interference can have wide and unexpected consequences. For this reason, many of those of a 'deep green' or ecocentric perspective advance the principles of

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[159] Paraphrased by Lukas Meyer, *supra* n153.
[160] Wesley N Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16.
[161] See pages 109-121.
[162] Edith Brown Weiss, *supra* n142 at 201.
[163] See pages 109-121.
[164] *Ibid.*
[165] See pages 109-121.
[166] Robert J Goldstein, *supra* n151 at 95.

stewardship, not as a matter of intergenerational equity, but as a means of promoting ecological principles. As Caldwell makes clear however stewardship can only promote ecological principles where it is accompanied with a change in social behaviour and understandings of man's relationship with nature.[167] It is this aspect of stewardship that draws many tribal cultures to it e.g. American Indian and Aboriginal culture.[168] Buddhism also places value on ecological awareness[169] and stewardship for ecocentric, as opposed to anthropocentric reasons.

Difficult as it is to ground rights in future generations on the basis of intergenerational equity however it seems even more problematic to found an obligation on an individual person to behave according to the principles of stewardship on the basis of 'rights' of an ecosystem or a species. This paper is not the place to discuss the ability of animals and plants to hold rights,[170] but even if such rights are logically possible, the adoption of a wholly ecocentric approach to stewardship must result in serious consequences for the type of ensuing obligation.

It is suggested here however that it is not necessary to adopt a *wholly* anthropocentric view in order to allow the relevant rights to be vested in future generations. In the same way that parents have rights for the benefit of their children, and trustees have rights for the benefit of the beneficiary, it is suggested that future generations can be

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[167] Lynton K Caldwell, "Land and the Law: Problems in Legal Philosophy" [1986] *University Illinois Law Review* 319 at 334.
[168] Jim Poulter, "The Secret of Dreaming," [Aboriginal folktale] viewed 28th Sept. 2010 <http://learningtogive.org/resources/folktales/SecretOfDreaming.asp>.
[169] "The Brave Little Parrot," [traditional Jakartan story] viewed 28th Sept. 2010 <http://www.healingstory.org/treasure/little_parrot/brave_little_parrot.html>.
[170] For more information on this topic see: Anthony J. Povilitis, "On Assigning Rights to Animals and Nature" (1980) 2 *Environmental Ethics* 67; and Richard A Watson, "Self-consciousness and the Rights of Nonhuman Animals and Nature" (1979) 1 *Environmental Ethics* 99; Charles Hartshorne, "The Rights of the Subhuman World" (1979) 1 *Environmental Ethics* 49. Christopher Stone's article, "Should Trees Have Standing?: Towards Legal Rights for Natural Objects" [1972] *Southern California LR* 450 is also informative in this regard.

the holders of rights that the current generation act according to the principles of stewardship, both for their own benefit, and for the benefit of the natural world. This allows us to take a middle course between a wholly anthropocentric and a wholly ecocentric approach. It allows a recognition that both man and nature can be benefitted if stewardship is adopted given its anthropocentric and ecocentric secular justifications.

(c) Judeo-Christian Stewardship

There is also widespread non-secular justification for stewardship. It has very strong ties with both Judeo-Christian[171] and Islamic culture. Christian and Jewish philosophies draw on, amongst other texts,[172] Genesis: "[t]he Lord God took the man and put him in the garden of Eden to work it and keep it".[173] This viewpoint sees man as unique in being able to protect other parts of the ecosystem. With this ability comes responsibility to ensure that man does not exploit the Earth, but instead maintains it and keeps it on behalf of God. As with the secular justification of intergenerational justice, many have argued that this attitude, of man as dominant over nature, tends to sacrifice nature to man's will rather than imposing a duty to protect it.[174] Brennon and Lo argue however that "[t]he Judeo-Christian tradition of thought about nature, despite being predominantly "despotic", contained resources

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[171] John Passmore, *Man's Responsibility for Nature 2nd Ed.* (London: Duckworth, 1980).
[172] Psalm 148, Leviticus 25.
[173] Genesis, 2:15, English Standard Version, <http://www.biblegateway.com/passage/?search=Genesis+2&version=ESV> viewed 3rd Dec 2010.
[174] For example, Peter Singer, *Animal Liberation: A New Ethic for Our Treatment of Animals* (London: Jonathan Cape, 1976); Lynn White, Jr., "The Historical Roots of Our Ecological Crisis" (1967) 155 *Science* 1205; John Black, *The Dominion of Man* (Edinburgh: Edinburgh University Press, 1970). See also John L Paterson, "Conceptualising Stewardship in Agriculture within the Christian Tradition" (2003) 25 *Environmental Ethics* 43 at 44 and footnote 6.

for regarding humans as "stewards" or "perfectors" of God's creation".[175] The United States Conference of Catholic Bishops[176] agrees with this, describing man's stewardship of land as being about thoughtful rather than selfish management.[177]

Not only is there a strong philosophical justification for stewardship founded in these religions, there is also a strong link between the Judeo-Christian concept of stewardship and the legal principle. It is perhaps unsurprising that the links between them are so close since the two grew up side by side in early legal systems. This can be seen in Leviticus 25:23: "The land shall not be sold in perpetuity, for the land is mine. For you are strangers and sojourners with me. And in all the country you possess, you shall allow a redemption of the land".[178] The reference here to tenancy demonstrates the links between the ethical and legal principle. At the time of the Old Testament, a steward was generally a manager for another, usually a Royal personage.[179] It seems then that not only is there a Judeo-Christian justification for the principles of stewardship, these religions have also helped to shape the content of the legal forms of the principle.

(d) Islamic Stewardship

Islamic philosophy on stewardship also sees the world as belonging to God with man accountable for its upkeep.[180] An example of this is the Islamic law rule of "himas"

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[175] Andrew Brennon and Yeuk-Sze Lo, "Environmental Ethics," 2008, 28th Sept. 2010 <http://plato.stanford.edu/entries/ethics-environmental/>
See also Lloyd Steffen, "In Defense of Dominion" (1992) 14 *Environmental Ethics* 63.
[176] United States Conference of Catholic Bishops, "Renewing the Earth" 1991, Part 1 Para C.
[177] See also The General Synod Board for Social Responsibility of the Church of England, "Christians and the Environment" quoted in Robin Attfield, *supra* n131 at 48.
[178] Leviticus 25:23, English Standard Version <http://www.biblegateway.com/passage/?search=Leviticus+25&version=ESV> viewed 3rd Dec 2010.
[179] John L Paterson, *supra* n174 at 49.
[180] Robin Attfield, *supra* n131 at p53.

which involves the protection of specified areas of land from overuse. This rule is being used today in Islamic cultures to advocate a stewardship approach to environmental protection:[181] "[t]he overall goal of the Hima revival is to mesh traditional practices with recent conservation science as a way to reach sustainable development".[182] This attitude is a reflection of the teachings of the Qur'an, which states: "I am setting on the earth a vice-regent".[183] This is not to say of course, either in relation to Islam, nor the Jewish and Christian faiths, that there is a prevailing opinion that man is steward of the earth amongst followers of the faiths. Rather the purpose of this discussion is to demonstrate that the principle does at least find support in these religious texts such that it is possible to draw on the relationship between man and the Deity in order to justify stewardship.

(e) The success of and interaction between these justifications

There is therefore a series of strong justifications for stewardship. As was highlighted above, there are flaws in these justifications and each may not be capable of justifying stewardship but there is not space here to defend each of the justifications against possible criticisms. Instead, it is hoped that the discussion here has shown enough at least to suggest that the stewardship obligation is potentially justifiable. This paper is not the place to attempt to outline a definitive 'justification' for stewardship. It has been argued at least however that the anthropocentric and ecocentric views can to an extent be reconciled.[184] Barrett and Grizzle describe the

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[181] Richard Foltz, "Is There an Islamic Environmentalism?" (2000) 22 *Environmental Ethics* 63 at 64. See also, Iqtidar H. Zaidi, "On the Ethics of Man's Interaction with the Environment: An Islamic Approach" (1981) 3 *Environmental Ethics* 35.
[182] The Society for the Protection of Nature in Lebanon viewed 30th Sept. 2010 <http://www.spnl.org/load.php?page=hima_history>.
[183] Qur'an 2:30, translation taken from Richard Foltz, *supra* n170 at 64.
[184] Christopher Barrett and Ray Grizzle, *supra* n135.

pitting of ecocentrism against anthropocentrism as unnecessary.[185] It is not possible to draw all these justificatory threads together in limited space, but what can be said clearly is that the justification for stewardship broadly relies on the fact that man ought to manage natural resources, be this for his own benefit, for the benefit of nature, or in order to fulfill his obligations to God. As a result environmental stewardship must at least aim to protect and manage the state of land and must do so for the benefit of the future.

Neither an ecocentric nor an anthropocentric justification for stewardship can perhaps fully account for the obligations that arise through stewardship, and reconciling them in the way suggested here does not necessarily solve this problem. Thus an anthropocentric approach does not demand that a land owner manage his land in order to ensure a range of ecological habitats where the species that subsequently flourish do not give rise to any identifiable benefit to man. Conversely, stewardship obligations do not necessarily demand that the interests of nature are treated equally with the interests of man such that the obligation can be justified by deep green principles. This is not to say that stewardship obligations cannot be justified, but that 'stewardship' as a concept is sufficiently broad to cover the obligation that results when one of these perspectives is adopted. Ecological justifications cannot explain the full range of potential stewardship obligations, and nor can anthropological justifications. But this does not mean that a stewardship obligation cannot be justified, and that its content cannot be linked to its justification. As a result, it is necessary to choose, to some extent, which aspect of stewardship to prioritise. The explanation of the various justifications for stewardship simply helps

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[185] *Ibid* at 35.

us to understand the content and shape of the relevant obligations and why they might arise.

For the purposes of this paper then it will be assumed that at least part of the interests of the future that will be protected are the interests of future man. This approach is also adopted by Barrett and Grizzle who specify that, "we subscribe to the weak anthropocentric view that although humans are not exclusively valuable, as implied by strong anthropocentrism, neither are they of equal value with all other species, as suggested by biocentrists".[186] As a result, the assumption as to benefitting future man here will allow us to ground rights in future generations. Even from an ecocentric perspective, it is possible to act for the benefit of man (although not man alone) since the human race does form part of the ecosystem. It will also be possible to grant rights to man in order to protect nature since only man has the abilities to act consciously to protect the ecosystem. By granting rights to future generations[187] that the ecosystem be protected, the obligation on current generations becomes enforceable. As a result of this, the steward must keep in mind the needs of future generations when making decisions over the future of his land and it is this aspect of stewardship that this thesis suggests lies at the core of the idea.

These justifications therefore suggest not only that stewardship as an ethical principle can be justified, but also get to the heart of what this principle is about. This paper will look at some questions relating to the nature of the ethical principle of stewardship in order to determine its content and nature more fully, before moving onto the principle in law.

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[186] *Ibid* at 36.
[187] See also pages 49-51.

(3) Is stewardship an end in itself or a means to an end?

Whilst it has become apparent that stewardship can be justified, we must ask whether it is necessary to go beyond ensuring that the underlying justifications are met. That is, is it enough simply that man behaves ethically, or ought we to frame our stewardship obligations in such a way as to ensure that the 'justification' is actually met, rather than simply the good of complying with the ethical principle? Can we comply with the ethical principle of stewardship without actually achieving the goals behind the principle? This has important implications, as will be seen, for the nature of the legal principle of stewardship.[188]

It can be argued that a legal system might decide to rely on a stewardship system of property in order to ensure the protection of natural resources,[189] sustainable development,[190] or good ecological practice. Frazier for example argues that property rules should be used to find a balance within the environment with a focus on ecology.[191] But there are other ways to ensure these outcomes without relying on a system of stewardship even though stewardship may be morally 'good'. There must therefore be some value in taking the stewardship approach, even if the 'aims' of stewardship can be achieved in other ways and indeed if complying with the stewardship obligation does not in fact lead to greater justice between generations,

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[188] See pages 65-99.
[189] Christopher Rodgers, "Nature's Place? Property rights, property rules and environmental stewardship" (2009) 68 *Cambridge Law Journal* 550.
[190] James P Karp, "A Private Property Duty of Stewardship: Changing our Land Ethic" 23 *Environmental Law* 735 (1993) at 735, *abstract*.
[191] Terry W Frazier, "The Green Alternative to Classical Liberal Property Theory" (1995-1996) 20 *Vermont Law Review* 299.

protection of the environment for its own sake, or protection of the planet as representatives of God.

It can be seen as valuable in itself that land is viewed as a continuing commodity which is intimately connected with the fate of future generations such that there is a duty on us to ensure that these generations are taken into account when decisions are made as to the fate of land. In Frazier's words, "ecology's emphasis on interdependence provides a scientific and moral basis for defining our responsibility to society with respect to property ownership".[192] As a result of our unique ability to control the biosphere, arguments from the perspective of ecological justice demand that we take account of the needs of future generations and least pass on the planet in no worse a condition than we receive it.[193] This does not tell us however that these needs should be the 'trump card' outweighing the needs of the current generations regardless of other factors or why the change of attitudes required for stewardship to become prevalent cannot simply be by-passed by the passing of strict regulatory standards through command and control legislation.

This thesis does not attempt to justify legislation on the basis of stewardship, nor to advocate this approach. It simply seeks to ask whether the contaminated land regime does in fact take this approach. The relationship between stewardship attitudes and a command and control approach must however be addressed. The key to stewardship is that the decision-maker has in mind the interests of the future and that he is accountable or answerable for his decisions on this basis. A command and control approach which sets the 'outcome' of the decision in advance would perhaps not

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[192] *Ibid* at 319.
[193] Edith Brown Weiss, "The Planetary Trust: Conservation and Intergenerational Equity" (1983-1984) 11 *Ecology L.Q.* 495 at 498-499.

encourage the development of a stewardship attitude and as such would not impose a system of stewardship even if the standards set are intended to benefit the future or to promote sound ecological practice etc.[194]

The key to ascertaining which of these approaches is in play in a particular circumstance lies in the decision-making process and it is this process that is so central to the ethical principle of stewardship. The decision must be left to the steward (and as we have seen, he will be accountable for any failure to comply with his obligations in making this decision[195]). The means by which he manages his land is a matter for him. If the means he adopts do not in fact promote the interests of future generations, or if it is demonstrable that in the course of his decision-making process he did not take account of these interests, then he will be answerable for this failure. It is his decision however how far to promote the interests of the future above the interests of the present.

It seems then that whilst the stewardship principle will affect decision-making, it does not in itself always tell us what the correct decision will be. To use a hypothetical example from a situation of contaminated land, the steward may have to decide between a costly but speedy clean up, and a cheaper but slower method. By employing either of these methods he will manage the state of the land for the benefit of future generations. This is exactly what he intends to do. Would a system of stewardship dictate between these two options? Stewardship would not tell us which option was better in and of itself. The justifications behind stewardship might help, but this means considering more than simply the obligation to make decisions to

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[194] Welchman describes the appropriate attitude that stewards must hold. Jennifer Welchman, *supra* n130 at 415*ff*.
[195] See also pages 61-65 and 74-80.

manage land in accordance with the interests of the future. The reason for this is that simply stating that we should act for the benefit of the future does not tell us to what extent the needs of the present generation should be ignored where two possible routes will lead to the same benefit for the future.

As a result it is possible to argue that stewardship is linked to a more decentralised mode of decision-making.[196] As Attfield highlights, "depicting humanity as in a position of trust with respect to nature does not involve understanding society or government as either undemocratic or unrepresentative; if anything it commends democratic debate, so that the members of society can jointly discover or decide how to exercise their role".[197] The adoption of the attitude of stewardship as a legal principle has benefits beyond the effects that it has in improving the state of land for the future, or maintaining a healthy ecosystem etc. It is said to change the method of decision-making within a local or national area. When ascertaining whether the contaminated land provisions impose stewardship obligations then we must ask not only whether they mean that land is managed for the benefit of future generations, but also whether they encourage and allow the development of the attitude of stewardship and the decision-making processes associated with stewardship.

(4) Breach of the moral obligation to act according to the principles of stewardship.

Thus although there is perhaps not one single justification that explains the stewardship obligation, it has been demonstrated that if stewardship is indeed justifiable, the obligation that arises is one which is of value in and of itself, rather

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[196] The Duthchas Project, "Act Local: Community Planning for Sustainable Development. The Duthchas Handbook" (Inverness, June 2001).
[197] Robin Attfield, *supra* n131 at 49.

than simply being a means to an end. It remains to be seen however what, if any, sanction applies if there is a breach of this moral obligation since this would help explain the accountability aspect of stewardship which, as will be seen below, is so central to the legal principle of stewardship.[198] What happens when you are a bad steward? This thesis does not attempt to provide a conclusive answer to this question, but simply to point out some possible sanctions in order to shed light on stewardship as a legal principle.

There are at least two types of sanction that may be imposed on a 'bad steward'. Firstly, there is the sanction of condemnation- be that, according to a religious understanding of stewardship,[199] a sanction imposed by God, or in a secular understanding,[200] condemnation by the community of which an individual is part. Secondly, there is a more complex type of sanction that arises as a result of failure to confer a benefit on oneself. The steward will be a member of a generation benefitted by the imposition of stewardship obligations onto those in a position to make decisions about the state of land.[201] By failing to comply with the stewardship obligations that fall on him, he acts on his land in such a way that is detrimental to himself as a member of the wider land community. These potential sanctions will be explained in turn although it should be understood that failure to comply with stewardship obligations could lead to both sanctions arising.

Firstly there is the sanction of condemnation by others. This sanction is often used to explain the motivation behind compliance with a rule. Hart, for example, makes clear

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[198] See pages 74-80.
[199] See pages 53-55.
[200] See pages 46-53.
[201] This approach, outlined by Tony Honoré in "Groups, Laws and Obedience" in *Making Law Bind* (Oxford: Clarendon Press, 1987) owes much to Rawls' approach to intergenerational justice. For more on this see above pages 48-51 and n149.

that rule breaking justifies "hostile reactions"[202] and as such can be seen as a reason why people follow moral, and indeed legal, rules. As Green highlights, "the normal function of sanctions… is to reinforce duties".[203] It is clear however that this sort of sanction is not necessary in order for the rule itself to be valid.[204] Thus the rule can exist even if there is no moral condemnation for its breach. There may be many reasons why there is no sanction for any particular breach- impossibility of discovery of the breach; any explanation for the breach lessening the moral condemnation attached to the breach; or indeed simply ambivalence or forgiveness in those who would normally supply the condemnation (i.e. the citizenry, or the Deity). Whilst none of these factors means that there would *never* be a sanction for breach, they do mean that sometimes there would be no sanction and yet there is no doubt that the rule would still exist.

There are two ways out of this difficulty. The first is to suggest that what matters for stewardship is not that there would be a sanction if the obligation was breached, but that there could be. There must be at least the potential for accountability. The second explanation is that the moral stewardship obligation would only exist as long as there was no systematic ambivalence towards the breach. If there was a common attitude that breach of the obligation would not justify condemning the person who committed that breach, the rule would, in effect, no longer be a rule of the particular system or group.[205] As a result, it seems, there must be at least the potential of social

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[202] Herbert L A Hart, *The Concept of Law* (Oxford: Oxford University Press, 1994) at 82 quoted in Andrei Marmor, "The Nature of Law" visited 11th February 2011, http://plato.stanford.edu/entries/lawphil-nature/.
[203] Leslie Green, "Legal Obligation and Authority" visited 11th February 2011, http://plato.stanford.edu/entries/legal-obligation/.
[204] The example given by Leslie Green is the duty of the highest court to apply the law. *Ibid*.
[205] Tony Honoré, *supra* n201 at 39.

condemnation in order for us to conclude that there is a moral obligation to comply with the requirements of stewardship.

The other possible source of such a sanction arises as a result of the fact that, in addition to being subject to the responsibilities of stewardship, a steward, is a member of a generation in theory benefitted by the duties of stewardship.[206] By failing to comply with his own stewardship obligations, he risks his being a beneficiary of the obligation in others. In brief, he makes it less likely that others will also comply with their stewardship obligations. This will impose a sanction on him because he will not thereby be benefitted by others complying with their obligations. Here by breaching the stewardship obligation, the steward no longer ensures that his and other land is in a good state for his own future use. He does this because there is a risk that the rule is no longer effective as Honoré outlines.[207] He thus loses a benefit himself in prioritising his short-term ambitions, or laziness etc over his long-term needs as a human being and member of the land community.[208]

As a result, we can see that even if there is no mechanism or means of social condemnation in a particular case for breach of the moral stewardship obligation, there is another sanction in the form of a potential failure to benefit. This goes into explaining why the legal principle of stewardship entails mechanisms for accountability. For a breach of the moral obligation of stewardship a steward will be accountable to God, to society, or to himself. The transformation of this into a legal rule has implications for the types of sanction that exist and explain why it is that the

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[206] See pages 46-51.
[207] Tony Honoré, *supra* n201 at 39.
[208] For more on the concept of land community see pages 77-80.

mechanism for accountability that forms part of the contaminated land provisions is a part of the overall picture of the place of stewardship within the regime.[209]

(b) Stewardship as a legal principle

Having discussed the ethical background to the principle, this paper will now examine the nature of stewardship as a legal principle and in doing so to begin to outline the hallmarks of stewardship to be discussed later. How has this principle manifested itself in law to date and what are the characteristics of a legal system based on the principles of stewardship? As with the ethical principle, the meaning of the legal principle varies hugely according to context and there is little consensus over what it means,[210] even within one context. There are two key strands of stewardship that will be discussed here.

The first is the "steward" as warden of a house, i.e. the literal translation of the word steward from *waerd* (warden) and *stig* (house).[211] This extends into the figure of the steward as the agent or land manager for the existing owner of the land.[212] He was the "arch-administrator of the lay estate".[213] Swett succinctly outlines his role: "The steward was his lord's agent, paid to serve his interests, please him, and protect his property".[214] This principle looks at stewards as acting for the benefit of another, but for the present only, not for the future (unlike the ethical principle outlined above). This form of stewardship, as Denman makes clear, was a question of administration

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[209] See pages 76-80.
[210] William Lucy and Catherine Mitchell, *supra* n137 at 584.
[211] John. L. Paterson, *supra* n174 at 50.
[212] Robert. C. Stacey, "Agricultural Investment and the Management of the Royal Demesne Manors, 1236-1240" (1986) 46 *The Journal of Economic History* 919.
[213] Donald R Denman, *Origins of Ownership* (London: George Allen & Unwin Ltd, 1958) at 116.
[214] Katherine Swett, "Review of Stewards, Lords and People: The Estate Steward and His World in Later Stuart England" (1995) 26 *The Sixteenth Century Journal* 686.

rather than morality and is not the focus of this paper. The steward here acts as an agent for the principal landowner. He is not bound by obligations of stewardship, but must act for the benefit of the principal by virtue of his acting as agent.

The second strand is the steward as the trustee for the unidentified or future owner of land. The second strand can be seen in Scottish clan structures with the chief of the clan for the time being charged with improving the land for the good of the clan for now and in the future. The concept of *dùthchas*, or trusteeship, highlighted this duty on the part of the clans to maintain the stock of their property.[215] This duty "had no force in law, [but] nevertheless had the force of custom behind it"[216] and as Dodgshon highlights, the boundary between law and custom at this point in Scottish history was difficult to draw.[217] In terms of accountability, the clan chief would be accountable to his clan members, and in practice a clan chief who did not act in accordance with this principle would struggle to maintain the allegiance of his extended family group.

Certainly it is known that consenting to a clan's eviction from the land amounted to a breach of the duties associated with the *duthchas* and alienation of the totally of the land too would constitute such a breach.[218] The role of each individual tenant farmer was as maintainer and manager of the land for the benefit of the clan as a whole, both for now and in the future. The notion of stewardship underpinned Highland land holding until the demise of the clan structures. In fact, Hunter argues that it was the abandonment (an abandonment strengthened perhaps by the advent of land

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[215] Allan I Macinnes, *Clanship, Commerce and the House of Stuart, 1603-1788* (East Linton: Tuckwell Press, 1996) at 3 and 5-6.
[216] Robert A Dodgshon, *Land and Society in Early Scotland* (Oxford: Clarendon Press, 1981) at 110.
[217] *Ibid* at 110.
[218] Allan I Macinnes, supra n215 at 40-41.

registration) of this concept of land-holding that prompted the demise of the clan structure: "all concept of the kindred's interest in the land was consequently cast aside, while the encouragement thus given to former chiefs to become landlords on the southern model virtually shattered the already weakening paternal affection which the traditional chief had felt for his clan".[219]

This concept was however again used in 1998-2001 in Scottish Highland communities to encourage sustainable development and management.[220] The philosophy of the clan structure may not have entirely left the Highlands. Many landholders today still see their role as maintaining and improving their land for the benefit of their children. There is of course a difference in seeing yourself as acting for the benefit of your direct family and for the benefit of the land community as a whole, but the notion that land should be preserved for future generations is at the heart of both attitudes. These attitudes tend to lead to stewardship behaviour, even if there is no legal obligation to behave this way. What we can derive from the Highland example however is that the legal obligation (if we can take this to have been at least quasi-legal) was to manage the land for the benefit of the present and future clan, and the clan chief could be held accountable for the mismanagement of the land. Both of these aspects will form part of the hallmarks of a system based on stewardship.

These two strands then have existed in property regulation in the United Kingdom, and they were very influential until the advent of the strong liberal concept of

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[219] James Hunter, *The Making of the Crofting Community* (Edinburgh: John Donald Publishers Ltd, 1976 (1995 ed)) at 13.
[220] The Duthchas Project, "Our Place in the Future" viewed 7th October 2010 http://www.duthchas.org.uk/.

property rights that coincided with industrialisation. It might even be said that 'stewardship' in some form or other has been the norm for legal regulation of land in the UK through history. The reality is, however, that today stewardship is not the prevalent accepted method of land holding. If the contaminated land provisions are an example of regulation on the basis of stewardship, they will today be relatively unusual.

Some legal systems have however relied on stewardship to a much greater extent, and a further aspect of stewardship is also arguably prevalent in the Roman law of *usufruct*. Although the 'steward' in this case was only entitled to use the land and never came into ownership of it as such, the extent of his rights can be compared to the rights and duties of the feudal tenant.[221] Whilst the *usufructuary* had the right to take the fruits of the thing,[222] he had to maintain it and make no alterations to the object of the *usufruct*.[223] The standard of care in the *usufruct* was that of the *bonus paterfamilias*. This standard, i.e. that expected of a good head of a family, ties in with the notion of the usufructuary as a quasi-steward: he was expected to maintain the property with which he was entrusted to the standard that a person maintaining his property for the benefit of his family and its future and he was accountable to the bare owner if he failed to do so.[224]

As a general outline then, stewardship as a background principle in legal regulation generally demands that the owner of property use and manage that property for the benefit of something or someone else, but also allows the owner to do so. As Brown

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[221] John W Cairns, "Craig, Cujas, and the Definition of *feudum*: Is a Feu a Usufruct?" in Peter Birks (Ed.), *New Perspectives on the Roman Law of Property* (Oxford: Clarendon Press, 1989) at 75.
[222] See for example, Digest of Justinian, Book 7, Verse 1 (Paul); Book 7, Verse 59 (Paul); and Book 7, Verse 62 (Tryphoninus).
[223] Digest of Justinian, D.7.1.44 (Neratius).
[224] Digest of Justinian, D 7.1.70 (Ulpian).

Weiss argues, "[e]ach generation is thus both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it".[225] The steward is the beneficiary of rights and is burdened with obligations, a characterisation which is central to our later discussion. He is above all a decision-maker directed to take into account certain considerations whether he is charged with acting for the benefit of the future, or for the benefit of his principal and it is these features that appear in the examples of stewardship as a legal concept discussed here.

This analogy with a trust from Brown Weiss is important and deserves greater attention here since it is both instructive, and limited. Brown Weiss suggests that we should regulate our relationship with the planet through a "planetary trust" which is akin to a charitable trust of the sort found in Anglo-American trust law.[226] Although Brown Weiss argues that the resulting concept is still a trust,[227] it is suggested here that what she describes is not a trust, but is stewardship, and that the differences she highlights between "the planetary trust" and a charitable trust are the differences between trusts and the notion of stewardship. Firstly she highlights that trusts have a moment of creation: they are established as a result of an act, be that deliberate or unknowingly.[228] They do not just exist as the obligation to act as a steward could be said to exist. Of course, as Brown Weiss herself highlights "while no affirmative action need to be taken to create the planetary trust as a moral obligation, to have legal force it must be effectuated by positive law".[229] This does not mean however that the stewardship is created by an active step on the part of the steward, nor can it

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[225] Edith Weiss Brown *supra* n142 at 200.
[226] Edith Brown Weiss, *supra* n193 at 503.
[227] *Ibid*.
[228] *Ibid* at 504.
[229] *Ibid*.

be so created. Rather it is an obligation that forms part and parcel of the ability to make decisions about land.

Secondly, fiduciary duties as understood in Anglo-American trust law have detailed rules relating to value and ensuring the financial integrity of the trust.[230] There is no such fiduciary duty associated with stewardship. Instead, the provisions relate to a specific aspect of maintenance of the property- i.e. ensuring the land is in a particular state- rather than ensuring that the property keeps its financial value. Furthermore, the trustee in a traditional trust is able to sell the relevant property and allow the equitable interests in that to be overreached such that the beneficiaries' interest no longer rests in the original property.[231] This is not the case with stewardship since the interest of future generations in the land will remain regardless of any sale etc. Thus not only are the duties associated with stewardship different to those seen in a traditional trust situation, they also interact with the property in a different way.

A third and much more fundamental difference is the beneficiary of the trust and of the stewardship obligation. With a trust, even a charitable trust, the class of beneficiaries is limited. With the stewardship obligation this is not the case. The beneficiaries are all those in the land community,[232] i.e. all those who rely on the land for survival. That is, at the very least, all humans are beneficiaries of the stewardship obligation (animals may also be such beneficiaries but the controversy over the ability of animals to hold rights, which is not discussed here, is enough to make one pause rather than committing to animals being beneficiaries of this

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[230] See e.g. Ben McFarlane, *The Structure of Property Law* (Oxford: Hart Publishing, 2008).
[231] Law of Property Act 1925, section 27.
[232] See pages 76-80.

obligation[233]). Furthermore, the trustee of a trust will not always be a beneficiary of that trust, and in the case of a charitable trust he will not be, at least not 'with his trustee hat on'. By contrast, with stewardship, the steward as steward is necessarily also a beneficiary. The role of beneficiary and steward are inextricable. There are therefore crucial differences between the trust and stewardship although the analogy is an instructive one.[234]

Both concepts, as Welchman highlighted,[235] ask the steward to act for the benefit of something or someone other than themselves. There is no doubt that the contaminated land regime does demand this of landowners. It is suggested however that it goes further than this. It not only reflects a legal principle of one acting for the benefit of another, but also imbues this legal principle with the ethical foundation behind it, i.e. it ask the steward to act for the benefit of future generations and also represents the necessary aspect of answerability. In order to demonstrate this, the paper will now begin to look at some particular aspects of stewardship as a legal principle in order to be able to distil from the discussion some of the hallmarks of such a regime.

(1) Is a steward primarily a duty-bearer or a rights holder?

This question gets to the heart of what role a legal system would assign to a person acting as steward and to what extent he is made accountable for breach of any duties associated with his stewardship role. In order to determine this, it is necessary to understand more about the interaction between the steward's property rights in the

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[233] See page 46 and n170.
[234] See also pages 77-80.
[235] Jennifer Welchman, *supra* n130.

land and his obligations that derive from his role as steward. Once this is understood, it is possible to examine, firstly, the content of the obligation in more detail, and then secondly, the rights required in order to be a steward.

Lucy and Mitchell argue that the steward is primarily a duty-bearer.[236] Although he holds rights, the *raison d'être* for the steward is as someone who ensures that the property is maintained for the benefit of future generations. The effect that this would have on our analysis is that we would have to conclude that the steward's primary role was as 'guardian' of his land. A distinction is drawn with the *usufructuary* for whom the *raison d'être* for his rights in the land is to benefit himself- to use the land and take the fruits- not to benefit future owners.[237] As a result, although he must maintain the land and ensure that the overall resource level on the land is not diminished over the duration of his rights, the essence of the *usufructuary* is that he is a rights holder.

Lucy and Mitchell argue that steward, on the other hand, is only given rights as a means to allow him to perform his duties as a steward.[238] Whilst it is true that the steward is obliged, it is impossible to get away from the fact that he must have rights in the land concerned, and, most importantly, that we may only conclude that it is just to make him responsible for managing the land because he has rights to enjoy that land. It is also logical that an individual could become owner *before* he becomes a steward. There is no necessity that an owner of land be burdened with stewardship obligations- this is a choice for a legal system to make. For this reason, the rights associated with ownership can be separated from stewardship which is a package of

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[236] William Lucy and Catherine Mitchell, *supra* n137 at 584.
[237] See page 68.
[238] William Lucy and Catherine Mitchell, *supra* n137 at 584.

duties imposed onto his rights. It is therefore not possible to see the steward as largely or solely a duty-bearer.

Neither however should we conclude that as a result of being the person entitled to use and manage the land the role of the steward is primarily as someone who holds rights over land. He is more than this precisely because he is the steward. The dichotomy between rights-holder and duty-bearer is circular: it is simply two sides of the same coin. The rights that the steward has over land, to enjoy it himself, and to make use of the land in such a way that manages it for the benefit of the present and the future, are critical to his ability to be steward. It is for this reason that the test for who is the steward below relies on having rights over land.[239] To be a steward one must have both duties and rights.

There is then another way of characterizing the essence of the steward. The steward is the person most entitled to manage the land in question:[240] he is the decision-maker in relation to that land.[241] Having the decision-maker over the future of land burdened with obligations when making their decisions is a hallmark of a system based on stewardship. This is not often acknowledged in the literature, but it is argued here that this role is what is most crucial about the steward. The steward's rights in relation to the land can be exercised by him, but must be exercised in such a way as to comply with his obligation to manage the land for the benefit of future generations, as well as for his own benefit and for the benefit of other members of the current generation.

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[239] See pages 89-99.
[240] Terry W Frazier, *supra* n191 at 321.
[241] See also pages 89-99.

It is actually this aspect of stewardship which causes some from an ecocentric perspective to reject stewardship since they argue that it implies that man has dominion over nature if he is entitled to take decisions over its future.[242] Palmer for example argues that stewardship symbolises despotism, and this is precisely because the steward has such a central role as decision-maker.[243] Attfield rejects this argument, stating that a steward, whilst being a decision-maker, is subordinate in many ways to those whose interests his is charged with serving, in the manner of a trustee and his beneficiary.[244] It is this subordination that leads to the answerability for the steward. This complex relationship, of decision-maker and beneficiary, and of answerability, is a more accurate representation of the role of the steward than one which focuses on dominion.

The steward's decision-making is restricted and guided by the obligations that fall on him and his rights facilitate it. He is the primary decision-maker in reference to the land and becomes part of the land community[245] as a result of this. This means that he becomes part of the community of landowners who as a whole are obliged to act in furtherance of their stewardship obligations. By his membership of that community he also becomes a beneficiary of the ensuing approach to the management of land. Attfield outlines how a stewardship obligation 'owed' for future generations must operate in practice and it is clear that in his model the 'proxies' (i.e. those who become the individual representatives of future generations- in our model, the owner of the land and the steward) would become primary

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[242] See also pages 50-51.
[243] Clare Palmer, "Stewardship: A Case Study in Environmental Ethics" in Ball, J et al (eds), *The Earth Beneath* discussed in Robin Attfield, *supra* n120 at 48.
[244] Robin Attfield, *supra* n131 at 195.
[245] Terry W Frazier, *supra* n191 at 320.

decision-makers answerable to "as representative a body as could be devised, granted the nature of the interests in question".[246] Thus not only is the steward a decision-maker, he is a decision-maker who will be accountable to the state under a legal system that is based on stewardship as part of the land community. His accountability is a hallmark of stewardship, and the existence of the ensuing land community explains why the state ought to be the body that carries out this task of calling stewards to account.

The role assigned to the steward as individual representative of the future generations, is a complex, and at times apparently a contradictory one. He is not simply a servant of future generations; he is also at times their mouthpiece in the decision- a decision for which he will be answerable. He is the initial arbiter of what happens to the land at the present time, but he is also the arbiter of what characterises the *interests* of the future generations. Is it possible to be both? It is submitted that it is possible to in this sense represent the future generations, because he is part of the intergenerational community discussed here. If we take the idea that as a result of his role as a member of the land community he is able to assess what might be in the interests of future generations, it makes perfect sense for him to then make his decision on this basis. This decision will of course be potentially subject to review and in this review the state will act as proxy[247] to represent the interests of future generations - but he is able to both decide their fate and decide the interests of the future generations with which his stewardship obligation is concerned.

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[246] Robin Attfield, *supra* n131 at 195.
[247] See also pages 130-133.

It is this central role in the fate of the land which is key to the notion of the steward. In this sense he is neither primarily a rights-holder nor a duty-bearer, but he is, by virtue of his rights and the obligations attached to the exercise of those rights, a decision-maker. Demsezt describes the position of private property where the owner of the land acts as a broker taking into account competing claims of the present and the future. He argues that: "future generations might desire to pay present generations enough to change the present intensity of land usage. But they have no living agent to place their claims on the market".[248] The steward, it is submitted, must act as this living agent and act on the basis of uncertain or unknowable information. This fact should colour every aspect of a system of stewardship. The position of the steward is summarised by Attfield: "stewards can be curators, trustees, guardians and wardens".[249] Each of these persons is a decision-maker.

In his role as decision-maker however there is no doubt that in order for stewardship to function as a legal principle the steward must be accountable. This accountability can be explained in a number of ways. The first explanation arises from the fact that the legal principle is grounded in morality. It was argued above that the moral principle entails sanction for breach.[250] The legal principle would also contain such a sanction. Unlike with the moral principle however, the nature of legal norms is such that the sanction would not be imposed by the steward upon himself, or even by a Deity, but by the community of which he forms part, i.e. the state. This sanction would of course not always be applied, but the possibility of such a sanction is central to the concept of stewardship as a legal principle.

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[248] Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57 *The American Economic Review* 347 at 355.
[249] Robin Attfield, *supra* n131 at 61. For the limitations of the trust analogy see pages 69-71.
[250] See pages 61-65.

This can be seen if we look at Frazier's concept of the land community and its relationship with Honoré's discussion of the relationship between groups and legal rules. Our starting point is that by becoming a steward, through his ability to make decisions over the future of land, the steward becomes a member of the land community, that is, he is obliged by the rules of that community and benefits from others' compliance with those rules. This community is a legal community. Membership of this community is part and parcel of becoming a steward. In Honoré's language, the notion of stewardship is the "shared understanding" which defines the group, but this group can only exist as long as "the prescriptions to which the understandings related [are] broadly... effective".[251] In other words, the group understanding that land owners will comply with the requirements of stewardship will only define the group as long as the obligations are enforced. The land community can only exist as long as the obligations of stewardship are effective and since the land community forms a necessary part of the notion of stewardship, the disintegration of the group would mark the end of the legal principle of steward. The two notions are mutually reinforcing. As a result, the stewardship obligation must be to at least some extent upheld by the group- "there must be a substantial measure of compliance".[252]

In addition to the existence of the group however, as Honoré makes clear, the group relationship is necessary to the existence of the legal obligation *per se*.[253] This goes beyond the continuation of the land community, and into the continued existence of the law following the disintegration of the community: "all law is the law of a group

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[251] Tony Honoré, *supra* n201 at 38.
[252] *Ibid* at 39.
[253] *Ibid* at 33.

of individuals or of groups made up of individuals. No one can make a law purely for himself… The existence of a group is therefore a necessary and arguably a sufficient condition of the existence of laws or something like them".[254] Therefore, not only is the continued enforcement of the rule holding the group together necessary for the continued existence of the group, i.e. the land community, and the mutuality of benefit and burden associated with that group, it is also necessary for the continued bindingness of the rules associated with the group- in this case, the obligations of stewardship.

There is also another potential explanation of the need for enforcement, and thus mechanisms for accountability, of the obligations of stewardship and this comes from the analogy drawn by Brown Weiss with the trust mechanism.[255] Although Brown Weiss argues that the sorts of obligations we are discussing here *are* trust obligations, this paper suggests that the divergence from these rules outlined by Brown Weiss are significant enough to mean that, contrary to her argument, the 'planetary trust' is not a trust at all, but simply something like a trust.[256] Here the planetary trust is the notion of stewardship which although not a trust has similarities with a trust. Crucially however these differences do not prevent the parallel being drawn between a trust and stewardship in terms of accountability. The essence of a trust relationship is that the trustee is to be held accountable to his beneficiary for any failure to comply with his duties.

By analogy it can be argued that part of the essence of a stewardship obligation is that the steward is accountable to his "beneficiaries" for any such failure. The

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[254] *Ibid*.
[255] Edith Brown Weiss, *supra* n193 at 503.
[256] See pages 61-65.

difficulty with this is that the land community to which the steward is accountable exists across generations. This means that the trust must be enforced, as with charitable trusts, through the use of the state as proxy. This explains not only why there must be accountability mechanisms in place, but also why it is appropriate for the state to be responsible for such calling to account. It is not argued here that the state is the only potential proxy; it is equally possible to suggest that an independent charity or body should call land owners to account. It is argued only that the state can act as such a proxy. The reason why the state is able to act this way is because of its continuity and its role as link between various generations. The state also has the resources and knowledge to be able to act as proxy, and thus to ensure that the steward is made accountable as if he were a trustee.

Thus accountability can be seen to form a part of the notion of stewardship as a legal principle and although the steward is accountable to other members of the land community, this accountability is enforced by the state as proxy. The consequences of being called to account for failure to comply with the duties of steward should be a sanction strong enough to ensure compliance, as Honoré outlines,[257] but also a sanction which goes some way to redressing the wrong committed. In the contaminated land context, the sanction would be in ensuring that the land is cleaned up or in paying for others to ensure that. This can be seen when once again we look at the analogy with a trust.[258] The duty of a trustee is to personally account for what his beneficiary is due and he does this by either providing substitute performance or by paying money from his own account. As a result, not only must the steward be accountable for any failure to comply with his obligations but this accountability

[257] Tony Honoré, *supra* n201 at 39.
[258] See pages 69-71.

must also lead to consequences designed to achieve the same end result as if he had complied with his duties in the first place. This type of accountability is therefore an essential element of a stewardship regime.

(2) Does the obligation to take into account other interests relate only to the future or can it also be to preserve land for current generations and land users?

In making decisions about the future of land then the steward is burdened with obligations, and will be accountable for any breach of these obligations, and so the final part of the picture of the hallmarks of stewardship is what obligations bind this decision-making power. He has an obligation to consider and take into account interests of future generations. We must ask whether this obligation to take account of future generations prevents the steward from taking account of the interests of current generations. It is submitted that it does not. Caldwell in his assessment of the meaning of stewardship includes an obligation to take into account the needs of present generations when making decisions about the land.[259] Is this acceptable within a system of stewardship or is the focus only on the future - is there a duty owed also to present generations for responsible use? The reason why this question matters is because the two needs may conflict. How should this conflict be resolved? This is especially relevant in relation to land use since the needs of the present generation can clearly be detrimental to the future, without either use being irresponsible.

The answer to this question lies not in a dichotomy between the present and the future, but rather in the types of current and future interests that should be taken into

[259] Lynton K Caldwell, *supra* n126 at 766.

account. Stewardship as a principle does not allow all future interests to be sacrificed for the benefit of the present, but it does not mean that the present interests cannot also be served. The solution of the types of consideration that should be taken into account feeds into our earlier discussion of the justifications for stewardship[260] and into the question about instrumentality.[261] Since the steward is decision-maker, he must be equipped with criteria to determine whose interests prevail where the interests of the present generation come into conflict with the potential interests of future generations. It is suggested that the source of this solution lies in the justifications for stewardship, in questions of intergenerational justice and ecological ethics. These both aim at balance: balance between the needs of the generations, and balance within the biosphere. The tools to assist the steward are to be found in these considerations, and as such economic advantage in the short term to the few should be discounted, but gradual rather than sudden improvement can be encouraged within stewardship since this achieves the balance that justice and ecological principles demand.

The interests of future generations can therefore be balanced with the needs of the current generations, and given a lesser priority, where it is possible to conclude that the need of the current generation is greater and more pressing. The stewardship duty, as a result of its foundation in ethics, is above all else about finding a balance between what is currently needed and what will be needed in the future. It is not about excluding one interest. From this discussion then we can highlight another hallmark of stewardship - the steward must have to take into account the interests of future generations when making decisions about the property, and he must do so in

[260] See pages 46-57.
[261] See pages 58-61.

order to further the aim of the legal regime, i.e. to ensure that land is managed in a responsible and careful way.

(c) Stewardship as an aspect of property

Before we can compare the contaminated land regime with these hallmarks of stewardship however, it is necessary to examine the relationship between the role of steward and ownership of land. We have established that one element of the legal role of the steward is as the owner of land subjected to the various rights and duties associated with this ownership within a system of stewardship. Although it is clear that the usage of the term steward is sufficiently broad to cover those who are *not* owners, but are instead appointed by the owner to make decisions over land, the usage of the term relied on in this paper will be where the individual in question has rights of ownership in land, but where he must use these rights in accordance with the principle of stewardship. The reason for this is that this accords most closely with the justifications behind the ethical principle. It is also the way in which most people discuss stewardship today.

Sheard highlights that "[s]uch stewardship rights are restricted property rights offering rights of use over land and its fruits but no right to damage it or to modify its nature in ways that put the basic interests of others, both current and future, at risk".[262] The other way of phrasing this is to say that stewardship obligations restrict property rights. This pattern of legal regulation of ownership can be seen in feudal

[262] Murray Sheard, "Sustainability and Property Rights in Environmental Resources" (2007) 29 *Environmental Ethics* 390 at 392.

land holding, in the Roman concept of *usufruct* and in the Scottish clan system.[263] The true steward is the "owner" of the land in that he has those rights which entitle a person to make decisions about the land. As a result there is a very close link between stewardship and property rights and this relationship must be explored in more detail.

Stewardship property is often contrasted with 'private property' and there is a long-running dispute as to whether private property as a notion is compatible with duties of stewardship, especially where those duties are imposed under the public law. The essential point that advocates of this argument make is that once an owner of land is restricted in the content of his rights to the extent that stewardship obligations demand, he can no longer truly be considered as owner of the land. It is not simply that his ownership has been curtailed, but that it is meaningless to say that he is owner at all. An outline only of this debate will be given here for the purposes of highlighting certain aspects of stewardship. It is argued that there is no necessary conflict between ownership in private and a system that subjects private owners to certain duties based on the legal and ethical principle of stewardship.

A starting point is in Waldron's definition of private property: "in a system of private property, the rules governing access to and control of material resources are organised around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual".[264] A similar definition is used by Demsetz: "private ownership implies that the community recognizes the right of the owner to exclude others from exercising the owner's

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[263] See pages 69-71
[264] Jeremy Waldron, "What is Private Property?" (1985) 5 *Oxford Journal of Legal Studies* 313.

private rights".[265] Using this definition Lucy and Mitchell have argued that "the existence of a duty of stewardship cannot be compatible with a claim to have private property in land".[266]

This argument does not stand up to scrutiny however. Duties of stewardship do not alter the organisation of access to and control of land. The power to make decisions of access and control still lies with the owner of the land.[267] The difference that the stewardship duties make is that he can be called to account for these decisions and that certain factors must be taken into account when making such decisions.[268] The decisions can be reviewed as to whether they comply with his obligation to maintain the property for the benefit of the future. His decision-making power remains.

For the same reason Gray's argument that where there is legislation which imposes restriction in the interests of public protection, the property has thereby become quasi-public, and can no longer be considered as private property, cannot be sustained. He argues that in such cases "The state itself becomes a vital factor in the "property" equation: all "property" has a public law character. Private "property" is never truly private".[269] Certainly there is some scope within Waldron's text for concluding that stewardship property is not private property when he states: "his [the owner's] decision is to be upheld by society as final"[270] in a system of private

[265] Harold Demsetz, *supra* n248 at 354.
[266] William Lucy and Catherine Mitchell, *supra* n137 at 586.
[267] See pages 89-99.
[268] See pages 121-123 and 129-131.
[269] Kevin J Gray, "Property in thin air" (1991) 50 *Cambridge Law Journal* 252 at 304.
[270] Jeremy Waldron, *supra* n264 at 327.

property. Arguably the steward does not have the final decision since his decision-making can be subject to review.[271]

There is no difference between this and normal property rules however and it is suggested that Waldron here is not excluding the possibility of review of decision-making, which, as we have highlighted, is an essential part of a system of stewardship. He is simply highlighting that the decision of the landowner is not to be taken as simply part of the equation of determining what is to happen to his land. There is a difference between the possibility of reviewing a decision, and treating that decision as only one stage in a multi-stage process. It is only the latter which is incompatible with Waldron's definition.

The power to review decisions in the courts at the suit of an organ of the state, be it the local authority or the Environment Agency, does not mean that the property is not held as private property and so this possibility in a regime based on stewardship does not mean that the property is not held in private. The question is not whether the decision is subject to review, but whether the owner of the land has a right to decide at all. In cases of stewardship the very essence of the principle is that he has a right to decide and a duty to decide in a certain fashion.

It is clear then, as Karp highlights, that "[s]tewardship can be imposed on private property ownership whilst preserving the important characteristics of private ownership, such as shared expectations, stability, fairness and liberty"[272] and, it has been argued here, decision-making power vesting with the owner. It is crucial is to recognize that the notion of stewardship relates to rights and duties - the content of

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[271] See pages 129-133.
[272] James P Karp, *supra* n190 at 735 *abstract*..

the 'bundle of rights'[273] that makes up ownership. It tells us nothing about whether or not private ownership should be permitted. Stewardship property would not fall under Waldron's category of "collective property"[274] since use and access to the property will not be determined by society as a whole for the benefit of society as a whole, but rather by an individual for a specified set of future interests. As a result, stewardship systems are compatible with the idea of private property; they just restrict private property rights and oblige the owner of the land to behave in a certain way.

The point which those who contrast private and stewardship property are getting at can however be useful. They are attempting to highlight the differences between owning in a system of stewardship, and owning within a system where the right to use and abuse the land and to exploit it for the owner's own benefit forms part of the 'bundle of rights' making up, in Honoré's terminology, the incidents of ownership.[275] English law has strongly resisted the idea that there can be a general equitable jurisdiction which prevents those with rights abusing them in order to maliciously harm others.[276] It is therefore no surprise that there is no general principle that a landowner cannot use his rights in land in order to abuse his land. Frazier labels this theory which sees the starting point for ownership as 'absolute ownership' the "classical liberal property theory".[277]

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[273] Tony Honoré, "Ownership" in A Guest (Ed), *Oxford Essays In Jurisprudence*, (Oxford: Oxford University Press, 1961) at 112.
[274] Jeremy Waldron, *supra* n264 at 328.
[275] Tony Honoré, *supra* n273 at 112.
[276] Michael Taggart, *Private Property and Abuse of Rights in Victorian England* (Oxford: Oxford University Press, 2002).
[277] Terry W Frazier, *supra* n191 at 300.

Although absolute rights of ownership have never existed in the sense that one person has *all* the incidents of ownership outlined by Honoré and unlimited liberty to do what he wants with an on his land, this idea does form the foundational philosophy of much worldwide regulation of ownership, especially in the USA[278] and UK.[279] Nonetheless, Caldwell is correct to state that "[t]he right to hold, enjoy, develop, and protect land, as well as to profit from its use, was never absolute".[280] Lucy and Mitchell agree with this assessment: "[The] undeniable truth about existing Western societies [is] that our rights of exclusion, control and alienation in relation to land are severely constrained".[281] This admission seems to detract from their argument that stewardship is incompatible with private property. Private property does not demand absolute rights. Caldwell accurately describes the attitude which is characteristic of systems of private property: "as owner of land he owed no obligation to neighbour or posterity, and very little to the state".[282] The attitude that an owner of land has no obligations to his neighbours of the future would be incompatible with stewardship, but there is no reason to adopt this attitude even if one does subscribe to a system of private property. Stewardship is therefore not incompatible with a system of private property.

As a result of this attitude however, regulation which could be said to reflect stewardship will struggle to be accommodated within a system whose structures

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[278] James P Karp, *supra* n179 at 736, using the terminology of 'frontier economics' from Michael E Colby, "Environmental Management In Development" (World Bank Discussion Paper No.80) coined by Kenneth Boulding.
[279] Eric T Freyfogle, "Context and Accommodation in Modern Property Law" (1989) 41 *Stan. L. Rev.* 1529 at 1553.
[280] Lynton K Caldwell, *supra* n126 at 762.
[281] William Lucy and Catherine Mitchell, *supra* n137 at 570.
[282] Lynton K Caldwell, *supra* n126 at 761.

evolved on the back of such a philosophy.[283] A system of stewardship can then be contrasted with prevailing systems of private property in so far as the content of the rights, and more particularly the attitudes associated with ownership, will be different. This has led some to comment that "environmental rules of this kind are arguably a new species of property rule in that they impose positive obligations as an attribute of the exercise of ownership privileges".[284] This seems to overstate the position. Environmental rules do not necessarily impose a new species of ownership. Ownership is still in private. They simply impose a new attitude that must accompany this ownership. The change is one in philosophy, not in the structure of ownership.

This change in philosophy does not mean that the notion of private property must be abandoned in favour of ownership on the basis of duties of stewardship. In fact, if individuals are to act as the steward it is necessary to retain a concept of private ownership. The relationship between stewardship and ownership of land is therefore not only a close one but also a critical one. In order to act as steward in the sense outlined here, the individual must have rights in the land in question in order to be able to make those decisions that are so central to his role. This begs the question then, who is the steward in this context?

Since we have characterised the steward as being the owner of the land because he must be the primary decision-maker in relation to that land, it is important to clarify what conditions he must satisfy before he can be considered as such a decision-maker. What rights must the steward of the land possess in order to be sufficiently

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[283] Christopher Rodgers, *supra* n189 at 556
[284] *Ibid* at 569.

capable of controlling events on the land to usefully be labelled steward? The question is not whether a person is the absolute owner (if such a thing exists), but whether he has sufficient of the bundle of rights that make up ownership for him to be able to act as a steward for the land. We must ask firstly, then whether only the 'absolute owner' (i.e. one who holds most if not all of the incidents of ownership outlined by Honoré) can be a steward of the property, and then secondly, whether more than one person or body can be the steward in relation to property at the same time.

(1) Who is the steward?

As far as the former issue is concerned, it is suggested that it need not be the 'absolute owner' of the property in the sense of an unburdened freehold owner. It will be very rare that a freehold owner of a parcel of land finds his land entirely unencumbered - freehold covenants, easements or the rights of a tenant will all restrict his rights of ownership as do the rules of the tort of nuisance. This is not a barrier to the imposition of stewardship obligations. What this does mean however is that the 'owner' in this broader sense, i.e. someone with sufficient rights to act as a steward generally, may not be able to take a particular decision that he believes is necessary to protect the interests of a future generation. One example might be that he is not entitled to allow some trees to grow since his land is burdened by a neighbour's right to light. In this case the owner would not have the right to grow trees, and there is no right to be burdened by his stewardship obligation. The owner cannot decide to grow trees, and so there is no decision-making process into which considerations of the interests of future generations can be fed.

This does not mean that no one is capable of being a steward however simply because their ownership rights are restricted in other ways. The person capable of being steward will simply be the person who is best placed to make decisions about the future of the property, i.e. the person who is capable of being steward. It is acknowledged that this is a somewhat circular definition, but it does at least make clear that there is no question of needing an absolute owner able to make every decision about the land.

Often it will not even be the person that we might commonly call the owner of the land who is best placed to make the decisions over the land. In relation to long leases, as is discussed below, if the freeholder can make decisions he may fall under a stewardship obligation, but, depending on the terms of the lease, he may not have any such power. The long leaseholder however is unlikely to have freedom to do whatever he wishes with the land. The incidents of ownership are divided and the position where there are multiple owners is discussed below.[285] The steward will however probably need to have certain types of rights before we can truly conclude that he is the steward. These rights would include, for example, the rights to decide the use to which the land is put; whether buildings can be erected on the site; whether the site can be used for excavation; if there is to be demolition of buildings; and the right to make decisions about the bringing in of wastes or other toxic materials onto the site that may cause harm to nature or lead to contamination on the site, amongst others.

Furthermore, Sheard argues that the content of a property right bounded by the principles of stewardship will vary according to the type of property we are dealing

[285] See pages 92-99.

with since the manner and needs for management of it for the preservation of future generations will depend on what the actual thing is.[286] As a result it is not possible to outline definitively in advance what rights are needed, hence the circular nature of the test employed. It is not argued that the test is necessarily helpful in practical terms, but it is suggested that it does clarify what is crucial about the person whom we are to label steward. It is not the person who would be most able to make the relevant decision as a result of his knowledge of ecological science, or the person with the most resources to put into managing land: it is the person who is best placed to manage the land given the rights that they have. It is for this reason that stewardship attaches to the owner of rights in land.

Finally, we must ask what impact on this analysis is made by the fact of rights of alienation. The owner of land can sell his land. Is this right bound by the duty of stewardship, or does it fall without the scope of the stewardship concept? It is suggested here that since it falls under the decision-making powers in relation to the land, the landowner will be bound to consider the needs of future generations and his obligation to manage the land to that effect when deciding to alienate his land. He could therefore be in breach of his stewardship obligations by transferring his land to another whom he knows will not act responsibly in relation to their own management of the land. It may also be that the person to whom the land is transferred does not comply with their stewardship obligations without the original owner being in breach. All will depend on the facts, but the existence of a right of alienation does not prevent the owner of land being considered its steward. He is simply able to

[286] Murray Sheard, *supra* n262 at 396.

resign from this post. Stewardship then is intimately connected with ownership and the rights associated with that ownership.

(2) Multiple owners

What happens however where different persons are authorised to make these decisions? There is an essential distinction in cases like this between those who are in general entitled to make decisions by virtue of their own rights in the land in question (such as the grant of a lease), and those who have been authorised by another to make decisions but do not have rights in the land. The latter category is the idea of the land agent in the sense used in the 19th century.[287] The land agent was authorised to make decisions about the estate and was its manager. This person is not the steward in the sense used in this thesis. The key to this lies in the fact that the authorisation for such a person to make decisions springs from somewhere and in most cases this will be from the freehold or long leasehold owner. The freeholder or leaseholder have chosen to delegate their decision-making, but have not limited their own property rights in the process. As a result they would remain steward. The land agent is simply an extension of the landowner himself. Where however the landowner grants out some of their own property rights, as with the grant of a lease, they may surrender enough of their own decision-making powers so as to no longer be the person most able to make those decisions necessary to be a steward.

It is in theory possible however that two or more people may be the steward of the property. There are two situations where this might happen. Firstly, there may be joint tenants of a long lease, or holders of the freehold as a joint tenancy. These

[287] See pages 65-67.

people hold under the same title and as a result have identical rights over the property. Where there was more than one person with the same title, the stewardship would then operate in the same manner as a trust since there can of course be more than one trustee, but they hold rights in the property identical to all other trustees. It is only at this point that factual possession will become relevant since where there are multiple owners the person in possession may in fact be best placed to decide the future of the property. This does not affect the character of the steward, simply their knowledge and practical ability. This position in terms of the stewardship obligation is relatively straightforward. The parties are owners of a single, unified estate, and are therefore jointly obliged to manage their land in such a way as to advance the interests of future generations.

Secondly, there may also be two or more owners of the land, for example under the relationship of landlord and tenant, or perhaps also where there is one person with a life interests or an equitable title under a bare trust, and another legal owner. In these cases the individuals have different rights and decision-making powers. It is argued here that although in some of these cases there will be more than one steward (in the case of certain landlord and tenant relationships) this will not always be the case. Crucially, when the relationship between the potential 'owners' is regulated under the trust, it will be the trustee, not the beneficiary under the trust who will be the steward, except in those cases where the trust mechanism is used to grant life interests,[288] since the balance of obligations between legal owner and beneficiary are quite different to the 'normal' trust situation. These situations will be examined in turn.

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[288] Law of Property Act 1925, section 1.

The position of landlord and tenant is one where it is possible that there will be more than one steward in relation to the land, and the stewards will have different rights over the land, and thus in consequence, they will have different decision-making powers. There are some situations, it is submitted, where the rights of the tenant under the particular lease arrangement will be such that it is not possible to conclude that they have any stewardship obligations. Thus in short residential leases, although the tenant will have an estate in the land, this estate will not have been granted with the power to make any decisions over the state of the land. In this case, although it would be possible to conclude that there is a stewardship obligation in one sense, since the tenant is an owner of an estate in land, the obligations would not 'bite' as there would be no rights to decision-making that would be limited by the stewardship obligation. In longer leases, and in leases where more extensive decision-making powers are granted, the stewardship obligation will bind the tenant to the extent of his estate. As a result, in a lease of 10 years in relation to a commercial building, for example, the company tenant would be obliged to manage their use of the building in such a way as to ensure that they were acting for the benefit of future generations. The extent of the obligation would relate to the extent of the rights.

There is a problem with this analysis which is that leasehold estates are, by their very nature, limited as to time, and the right over the land is limited accordingly. The freehold interest is, by contrast, in theory indefinite. Does it matter that the rights of the leaseholder are limited in time and that the leasehold estate can disappear? The reason why this might matter is if the stewardship obligation depends on the chain of ownership over land, as it appears to have done in the traditional system of Scottish

land holding for example.[289] It is submitted here however that since stewardship can be justified by wide considerations of justice not related to the relationship between successive land owners *per se* as explained above, it does not depend on the idea of the chain of ownership. The steward is not just managing his land for the benefit of future *owners* but for the benefit of future generations in general. This means that it does not matter that there may not be a chain of leasehold ownership in the land.

Similarly, it could be argued that the very philosophy of the lease, as ownership limited in time, is contrary to the idea that the estate should be managed for the benefit of the future. It might be that whilst the freeholder has responsibilities to the future, one of the great advantages of being a leaseholder is to remove the responsibility to maintain the property. Instead, the property can be used as desired, within the terms of the lease, with the freeholder left with any remaining responsibilities to ensure that the land is managed responsibly etc. In short, it could be argued that the lease arrangement is the entire extent of the obligations that will fall on the leaseholder.

This cannot be true. A leaseholder, as occupier of the land, can fall under numerous duties that are not outlined in the lease document, e.g. in relation to nuisance and the rules under the Occupiers' Liability Acts. The lease does not outline the total extent of the duties that fall on a leaseholder. Thus, if the leaseholder has rights which allow him to make decisions over the future of a particular area of land, then he will fall under stewardship obligations when making such decisions. He may not have such rights, but if he does have such rights, the fact that he is a leaseholder as opposed to a

[289] See pages 66-67.

freehold owner should make no difference to the conclusion that he falls under an obligation to manage the land for the benefit of future generations.

This analysis can be demonstrated by an example. The provisions of a lease stipulate that whilst the lessee is able to develop the property, he must obtain the consent of the freeholder. How would the stewardship obligations operate in this situation? It is suggested that the correct way to analyse this is as the lessee having the primary decision-making right but this right is limited by his obligations to manage the land for the benefit of the future. So, he would only be able to propose a development where that development met with his stewardship obligations. His rights are limited both by the obligations contained in the lease and the obligations that are imposed on him by the principle of stewardship. The freeholder does not have the right to build on the land but he does also have an important decision-making right and he too must act in such a way as to comply with his stewardship obligations. If the parties disagreed about the best way to proceed, and the landlord for example refused his consent where the development *would* benefit future generations, it is suggested that under a system of stewardship the landlord could be held accountable for his failure to grant consent to such a development.

In addition, where the terms of a lease were such that any compliance with them would inevitably lead to a breach of stewardship obligations, it is submitted that this does not alter the fact that the leaseholder is under such an obligation. He will simply be in breach of it if he decides something that he has power to decide in a way that contradicts his stewardship duties. If however the lease leaves him with no power of decision, then the breach of the stewardship obligations will rest with the landlord. In divesting himself of his rights of decision-making in such a way as to make a breach

of the obligations of stewardship inevitable, he has breached his own obligation to use his decision-making powers in a way as to comply with stewardship. As a result, although in practice the situation where there are multiple owners under a lease may be complex, in theory, the rights in the land are limited by stewardship obligations, whatever the nature of the estate held.

A good example of this sort of potential conflict- where the obligations of the steward conflict- is the position of the rules of good husbandry in agricultural leases.[290] Here, the requirement to maximise profit from the leased land will, in England at least, take precedence over the fact that the tenant has entered into a public stewardship scheme.[291] The tenant falls under conflicting obligations. How are such obligations to be reconciled and on whom does the responsibility fall for failure to comply with the stewardship obligation? It is suggested that in such circumstances, it is simply a matter of choice for the legal system to prioritise the obligations[292] and it is possible to conclude that the stewardship obligation which binds the rights that the various parties have, takes precedence over their private arrangements *inter se* and forms part of the general law, as with nuisance or the Ocucpier's Liability Acts. Thus the tenant could still fall under a stewardship obligation.

What is the position where, rather than more than one estate over the land, there is a legal and an equitable owner of the estate? There are again two situations to discuss here. The first is where there is a trustee of the freehold for the benefit of one or

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[290] Christopher Rodgers, "Rural Development Policy and Environmental Protection: Reorienting English Law for a Multifunctional Agriculture" (2009) 14 *Drake Journal of Agricultural Law* 259 at 284-287.
[291] See *R (Davies) v Agricultural Land Tribunal & Philipp* [2007] EWHC 1395 (Admin).
[292] See the Agricultural Holdings (Scotland) Act 2003.

more beneficiaries. The second is where there is a trustee of the freehold but the beneficiary has a life interest under a trust. In the former situation the position is fairly straightforward since the trustee as legal owner will be the one able to make decisions over the property. Under the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) the trustee will be required to consult with his beneficiaries when making decisions so far as is reasonably possible,[293] but is not required to obtain the consent of his beneficiary etc. As a result, the trustee will be able to make the relevant decisions himself in relation to the land and so will be under stewardship obligations in relation to the exercise of his rights. Although, under section 12 TLATA 1996, the beneficiary may have a right to occupy the land, this does not give him the right to make decisions over the state of the land except where the decision-making power is delegated from the trustee in which case the stewardship obligation would remain with the trustee. Bare trusts and trusts for more than one beneficiary do not therefore pose a problem.

The operation of trusts which give rise to a life interest in the land may be more complex. In such cases the decision-making powers over the land vest in the beneficiary. The tenant for life cannot act in any way which fundamentally alters the nature of the land, whether for better or for worse[294] and although most 'improving' actions will be permitted by the courts, any act which completely changes the land will not be permitted. This may severely restrict the rights of the life tenant and may mean that they are not able to make decisions to manage the land for the benefit of the future, but neither is the trustee able to make such decisions. This produces some difficulty for the analysis of who will be steward in this case. It can however be

[293] TLATA 1996, Section 11.
[294] *Lord Darcy v Askwith* (1618) Rob. 234.

determined that the life tenant will be the steward since in practice they have rights to take decisions over the property. The trustee is still responsible however for the exercise of the legal rights associated with his title, and as such he will be liable also where the exercise of these rights breaches his stewardship obligations. Their rights to do so may be severely curtailed, but the rights of a freeholder owner with no trusts interest etc may also be so curtailed as a result of the planning, tort other systems. Not having the full panoply of decision-making rights does not mean that a landowner is unable to fall under a stewardship obligation in relation to the rights that they do hold.

This discussion demonstrates therefore that it is possible to have multiple stewards in relation to one area of land where there are multiple right holders over that land. These rights will be limited by stewardship obligations. Thus each owner will be a steward to the extent of his rights. This discussion then has allowed us to ascertain who we will call steward, and what sort of obligations he will fall under. It has also highlighted a number of other characteristics of a regime that imposes such an obligation. It is to these characteristics that we now turn when assessing the contaminated land regime.

V What are the hallmarks of stewardship?

This extensive discussion of the ethical and legal principles of stewardship should now allow us to formulate a list of hallmarks which allow us to judge whether a regime, and here the contaminated land regime, is a system based upon the principles of stewardship and operating accordingly. Six hallmarks will be outlined briefly here along with the methodology that will be used here to test them. The purpose of this list is simply to provide a clear structure against which we can judge the regime. As a result it is perhaps oversimplified but it will at least provide a starting point for the ensuing discussion of the contaminated land provisions.

(1) The aim of the regime must be to preserve the quality and state of land for the future.

This simply looks at the aims of the regime. It is possible to derive the aim of a regime from the manner of its introduction and the statements of its proposers etc.[295] This approach to assessment of aim was taken above when discussing the motivation for the paper, but in analysing the regime itself the thesis will take a different approach. Instead of looking at the professed aim of the regime it will instead attempt to use the statutory provisions and guidance alone to determine the aim. We are looking for an objectively ascertainable aim from the provisions of the regime. This thesis will do this by looking at the criteria for intervention within the regime since this will demonstrate the harm that the regime is seeking to address.

[295] See pages 27-32.

(2) The regime must attempt to meet this aim by placing obligations on the owner of land for careful and responsible use and management.

This requirement focuses on two separate issues: the first is that the regime must in fact place an obligation on the owner of land by burdening his ownership rights. In order to determine this a brief discussion of the meaning of obligation will be followed by a close examination of the operation of the regime in relation to the owners of land to determine whether we can consider them to fall under an obligation. The second issue is that this obligation must be to make careful and responsible use and management of the land. In order to ascertain this, once it has been determined whether there is an obligation on the owners of land, the content of this obligation will be discussed.

(3) In considering what constitutes such careful and responsible use and management the landowner must, as a result of the regime, take account of the needs of future generations.

Following from the discussion in relation to hallmark (2), this hallmark requires that not only the obligation outlined in (2) relates to careful use and management, but also that in assessing what constitutes careful management, the owner of the land consider the needs of future generations. This will be determined by assessing what processes the owner must go through in making their decision and what factors must be taken into account. It is not necessary that future interests are the only factors considered, but it is necessary that they at least play a part.

(4) This obligation to make careful and responsible use and management of the land taking into account the needs of future generations must burden the owner's rights of ownership in the land.

This hallmark calls for the obligation itself to attach to the landowner's rights of ownership, not simply one incident of the rights of ownership e.g. the right to alienate the land. In order to ascertain whether this is the case in the contaminated land regime, the mechanism for imposition of the obligation on the owner of land will be examined.

(5) Not only must the regime call on the owner to do all these things, he must do them in a certain way. His decision-making process must be altered by the regime such that stewardship itself is encouraged rather than merely the outcome of the preservation of land.

This hallmark moves away from the content of the obligation itself and into the procedural aspects of a stewardship regime. The question focuses on whether the owner, in carrying out his obligation, is entitled to make the decision for himself in accordance with the philosophy of stewardship or whether the standard of remediation and the process of remediation is set by the regime itself thus robbing the steward of the appropriate attitude. This paper will examine this by looking in detail at the standard of remediation to be reached and the process by which a plan of action for cleaning up the land is formulated under the EPA 1990.

(6) The owner must be answerable for failures to meet his obligations.

Finally there must be some mechanism by which the owner of the land is made answerable for any failure to take account of the needs of future generations and to

make careful use of the land and manage it responsibly. This paper will look at this by examining the body to which the owner is responsible, usually the local authority, and in some cases the Environment Agency, since they make the assessment as to whether land is contaminated, and what format this responsibility takes.

VI: Does the Contaminated Land Regime Match these Hallmarks?

(a) Does the regime aim to preserve the quality and state of land for the future?

We have established that in order to represent a regime based on stewardship, the contaminated land provisions must aim to manage the state of land for the benefit of future generations, at least in part. This was one of the express aims of the drafters of the legislation.[296] The legislation itself must now be analysed to determine whether this aim is mirrored in the provisions such that the first hallmark of stewardship is met. Three key issues will be examined. Firstly, the criteria for intervention will be examined. Secondly, the role of the principle of risk assessment will be looked at in more detail. Finally, the tension in the regime between current usage and protecting future generations will be considered.

Before looking at these issues in more detail, the general criteria for intervention must be outlined. The starting point is to be found in section 78A(2)(a) EPA 1990 - " 'Contaminated land' is any land which appears to the local authority in whose area it is situated to be in such a condition, by reason of substances in, on or under the land, that - (a) significant harm is being caused or there is a significant possibility of such harm being caused". It is only if these conditions are present that the contaminated land provisions come into play. As a starting point it is worth noting that this definition in itself is not confined to preventing present harm. The notion of "risk of

[296] See pages 27-32.

harm" (as opposed to current harm) demonstrates that the regime is not simply concerned with past or continuing harm. It has at least half an eye on the future.

This conclusion is given more weight by the content of Annex 3 of the binding statutory guidance in DEFRA Circular 01/2006. The guidance makes it clear that the local authority can only conclude that the land is contaminated where the conditions in the relevant Table are met. Table A is concerned with whether there is currently significant harm being caused by reason of a substance in or under the land which although focussed on the present through the need for current harm, gives indications as to the longer term aims of the provisions as well. It contains criteria in relation to four different receptors. The treatment of these gives support to the notion that the regime aims at protecting interests of future generations.

The first receptor to be dealt with in the Table is "human beings". The definition specifies that where humans are concerned "significant harm" will include "death, disease, serious injury, genetic mutation, birth defects or the impairment of reproductive functions".[297] The focus on birth defects and reproduction is especially significant in showing that the regime aims to protect and indeed promote the existence and well-being of future generations. In short, the regime sees as significant, and therefore worth intervening to prevent, any harm which threatens the basic survival of human beings, both for now and for the future. It aims to ensure the continuing existence of the human species, and thus protects future generations also. This ties in with the definition of stewardship provided by Attfield.[298] The principles of intergenerational justice require us to at least ensure that the human species can

[297] United Kingdom, DEFRA, "The Environmental Protection Act: Part IIA- Contaminated Land", Circular 01/2006 (London: 2006), Annex 3, Table A(1).
[298] See page 41-42.

flourish. The regime does address these basic human needs and as such can be seen to aim to advance the interests of future generations to a limited, but important extent.

Problems caused to nature too are addressed in Annex 3. The criteria for intervention are met where there is a risk of significant harm to a part of the ecosystem only where there is a pre-existing conservation measure in place. Such measures include designation as an Site of Special Scientific Interest,[299] National Nature Reserve,[300] and as an Special Protection Area or Special Areas of Conservation.[301] These areas have been designated as vulnerable or of special scientific interests and thus both for the present and for the future they are the areas most worthy of protection. In restricting the natural interests that can be taken into account, the regime strikes a balance between the needs of the present and those of the future.

It is crucial to note however that the definition of significant harm highlights that the regime does aim to protect natural interests for the benefit of the future. It is specified that harm will be significant where it results in "an irreversible adverse change, or in some other substantial adverse change, in the functioning of the ecological system… or harm which affects any species of special interest within that location and which endangers the long-term maintenance of the population of that species".[302] This criterion highlights that the *status quo* is worthy of protection - the harm to be avoided is adverse 'change'. This is significant in that it implies that maintenance rather than improvement in relation to natural interests may be enough

[299] Wildlife and Countryside Act 1981, Section 28.
[300] Wildlife and Countryside Act 1981, Section 35.
[301] Conservation of Habitats and Species Regulations 2010, S.I. 2010/490.
[302] DEFRA, *supra* n297, Annex 3, Table A(2).

except where long-term population numbers are affected. Thus again although the primary focus of the regime is the present, there is recognition that the future generations should be taken into account with the reliance on long-term population numbers of other species since this all goes to maintaining the planet for the benefit of these future generations.

This picture, that the definition of harm within the regime looks at points towards the future, is confirmed by the third aspect of the Table which is concerned with property. In this section the aspects of property protected are those basic foodstuffs and natural products that are essential for the continuance of life, both now and in the future. In addition, in the fourth part of the Table Ancient Monuments and historic buildings are given special protection. The Table states that harm is significant where "the damage significantly impairs the historic, architectural, traditional, artistic or archaeological interest by reason of which the monument was scheduled".[303] The definition of harm therefore focuses on those very factors that stewardship argues should be protected in order that future generations are given the ability to promote the distinctive human characteristics. This implies strongly that the regime does indeed aim at protection of future generations within its criteria for intervention along with the undeniable protection given to the present.

Table A is not the only aspect of the definition of contaminated land that supports this conclusion. The approach that the regime takes to risk assessment and foreseeability is also significant. Para A:9 of Annex 3 of the Guidance introduces the concept of risk assessment for determining whether there is a possibility of significant harm. This concept encourages the idea that regime looks forward since it

[303] *Ibid,* Annex 3, Table A(4).

takes a precautionary approach to whether harm might occur on the basis of scientific information, rather than an approach which looks at the potential seriousness of the harm weighed against the cost of preventing it. It therefore attempts to take an objective assessment as to whether prevention of the harm is necessary rather than in the interests of the present generation.

Table B, which deals with the definition of "significant possibility of significant harm", also asks only for scientific information on the likelihood of harm. It does not ask what the cost of preventing the potential future harm should be in order to meet the criteria for intervention. As a result it simply attempts to assess whether future generations will be harmed if no intervention is made and attempts to protect them from such harm.

The regime undoubtedly at points looks to the future, even though the prevailing approach of the regime relates to current harm since the focus, as highlighted in Para A:25, is on the current use to which the land is being put. The paragraph instructs the enforcing authority to disregard anything which is not likely to be on the land under its current use. This does not mean however that the *aim* of the regime is not to protect future generations. Instead, it is argued here, this should be interpreted as the regime attempting to ensure that the *status quo* at least is protected for the benefit of future generations. A distinction is drawn between those who are likely to be harmed, a question which is ascertained by looking at current use, and those for whom we are attempting to prevent harm, which includes future users of the land. As a result, the argument that the regime is *only* looking to protect current generations because of its focus on current use does not stand up when discussing the aim of the regime.

(b) Does the regime place an obligation on the owner of the land for responsible management and use?

Before looking at this second hallmark, it is necessary to look briefly at the question of what constitutes an obligation. There are essentially three ways of looking at obligations - the first is as a non-optional course of conduct;[304] the second is as an exclusionary reason for action;[305] and the third is as obligations being the corollary of rights.[306] It is argued here that whichever of these definitions is adopted it is possible to conclude that the contaminated land provisions do indeed impose an obligation on the owner of land, but it is necessary to look at the meaning of these definitions in more detail in order to be able to demonstrate this.

Firstly, according to Green, "[obligations] are legal requirements with which law's subjects are bound to conform. An obligatory act or omission is something the law renders non-optional".[307] The key to Green's analysis of obligation is that he does not specify anything beyond the fact that the conduct must be non-optional. Crucially he does not link obligation and rights.

Raz too demonstrates that for there to be an obligation there is no need for there to be a correlative right.[308] Certainly he agrees that if there is a right there must be an obligation - but the opposite is not necessarily true. Kelsen would agree with this

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[304] Leslie Green, "Legal Obligation and Authority" first published December 2003, viewed 11th February 2011, <http://plato.stanford.edu/entries/legal-obligation/>.
[305] Joseph Raz, *Practical Reason and Norms* (London: Hutchison & Co Ltd, 1975).
[306] Wesley N Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16.
[307] Leslie Green, *supra* n304.
[308] Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 170.

assessment.[309] As a result of the argument, Raz is able to separate duty and right and concludes that an obligation is an exclusionary reason for action.[310] The reason that he concludes that an obligation does not lead to non-optional conduct is that there can be more than one obligation on a person pushing in different directions. Instead, the existence of an obligation is not only a positive reason why someone should behave in a certain way, but also prevents them from taking account of some other reasons in assessing what course of conduct to take.

This will become clearer with an example. There is an obligation to take reasonable care to avoid harming others. There is also a legal obligation to comply with our contractual obligations. If it would not be possible to comply with a contractual obligation without harming others arguably there are conflicting legal obligations resting on the actor. The solution lies in a third consideration i.e. that it is a defence to an alleged breach of contract if performance of it would be illegal. This third consideration solves the conflict. It is a consideration that the obligations do not exclude. The actor would not however be entitled to resolve the conflict by considering that it would be cheaper for him to pay damages to the injured party than to pay his contractual partner for breach of contract. Thus obligations act on our reasons for action - in law and in morality - but they do not render certain courses of action non-optional. They render certain reasons non-applicable.

Hohfeldian analysis, by contrast, sees obligation or duty as the necessary opposite of a right. In order for there to exist an obligation there must be someone in whom this opposite right vests. Rights are reflections of the right-holder's interests such that the

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[309] Hans Kelsen (trans Michael Hartney), *General Theory of Norms* (Oxford: Clarendon Press, 1991) at chapter 33, page 137.
[310] Joseph Raz, *supra* n305 at 35.

imposition of a duty is justified. Raz argues that assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties.[311] On this model then there would be an obligation resting on the owner of land where the interests of a rights-holder were reflected in a correlative duty.

It is suggested that the contaminated land provisions can fit into whichever of these models is adopted but that it is necessary to outline these options in order to demonstrate why it is legitimate to conclude that there is an obligation here. Firstly we must ask whether the contaminated land provisions impose a non-optional course of conduct onto the owner of land so as to meet Green's definition of obligation. It is suggested that whether or not the owner of the land becomes liable for the remediation works as a Class B person, the regime imposes a non-optional course of action upon them. This will be demonstrated firstly, in relation to the position of owners of land where there is a Class A person in existence, and then when the owner is a Class B person.

Class A persons will be liable to remediate the land[312] or to pay for the enforcing authority to clean it up.[313] The owner of the land is however obliged to permit this to take place. It is non-optional for them to state that they do not wish their land to be remediated. Under section 78G(2) EPA 1990: "any person whose consent is required before any thing required by a remediation notice may be done shall grant, or join in granting, such rights in relation to any of the relevant land or waters as will enable the appropriate person to comply with any requirements impose by the remediation notice". In all cases where a Class A person is liable to remediate the land where that

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[311] Joseph Raz, "On the Nature of Rights" (1984) 43 *Mind* 194 at 195.
[312] EPA 1990 Section 78F(1)-(3).
[313] EPA 1990 Sections 78N and 78P.

Class A person is not the owner and occupier of the land, there will be an owner or occupier of the land who is required to grant such rights. Although under section 78G(5) EPA 1990 such persons will be entitled to compensation, and under section 78G(3) EPA 1990 will be entitled to be consulted before the remediation notice is served, the grant of the rights of entry, consents etc is non-optional.

At this point it is worth emphasising the approach that the regime takes to the grant of such rights of entry since this is important in determining that an obligation does fall on the owner of land. It is submitted that there is a difference in this context between a deemed grant of rights and an obligation to grant these rights. Section 78G(5) makes it clear that here we are dealing with an obligation to grant rights: "a person who grants or joins in granting". The landowner must actually grant the rights. It is not that the need for these rights is dispensed with under the regime. As a result the grant of the rights is a course of conduct within Green's definition.

If no Class A person can be found however and a Class B person becomes the appropriate person then another obligation will fall on them. This is the obligation to remediate the land to the standard required. This obligation can lead onto the further obligations to carry out the steps required in the remediation notice but there is a pre-existing obligation that arises simply by virtue of the identification of the land as being contaminated. The owner does not need to wait for the remediation notice to be put together before his initial obligation becomes apparent. This is because the enforcing authority is instructed not to serve a remediation notice[314] if "[it] is

[314] EPA 1990, Section 78H(5)(b).

satisfied that appropriate remediation is being, or will be, carried out without the service of a remediation notice."[315]

The Class B person has an option - they can remediate the land to the appropriate standard voluntarily, or they can remediate the land according to the method outlined in the remediation statement. The obligation is to remediate the land to the required standard. At this point the method by which this takes place is not specified. There is therefore a legally non-optional course of conduct in the sense that the Class B person must remediate the land. If the Class B person does not undertake to remediate the land voluntarily there will be an obligation to comply with the remediation notice.[316] It is not an obligation to clean up the land to an appropriate standard *per se*. If however the steps required in the remediation notice would not clean up the land to this standard it would be possible for the land to be again identified as contaminated such that the original obligation, i.e. to remediate the land, came into play.

The contaminated land provisions do indeed impose a non-optional course of conduct. Green's definition of obligation is met. Do the provisions also impose an obligation as defined by Raz? Does the requirement that the Class B person remediate the land to a certain standard (whether or not this is in accordance with a remediation notice) act as an exclusionary reason for action? In order to determine this we must look at whether the owner can conclude that he will not remediate the land for reasons of cost or inconvenience. The answer is that he cannot conclude that he will take *no steps* on the basis of cost or impracticality. The requirement of para

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[315] DEFRA, *supra* n297, Annex 3, Para C.11.
[316] EPA 1990, Section 78G(1).

C.11 of Circular 01/2006 is that the voluntary remediation be of the same or better standard than that which could be required by a remediation notice. Remediation notices may only require that by way of remediation which is reasonable. As a result, the obligation to remediate does not include an obligation to go beyond that which is reasonable.[317]

The test for reasonableness in this context is to be found in Part 5 of Annex 3 of the statutory guidance.[318] The enforcing authority is entitled to take into account of the cost and practicality of the steps of remediation when assessing what to require by way of remediation notice. As a result, in order to achieve a standard better or equal to that required by the remediation notice, the individual, when considering whether to voluntarily remediate, is entitled to take account of cost and practicality. Costs and practicality cannot however 'trump' the requirement of remediation. The costs and practicality considerations go into what is to be done by way of remediation and demand that a cost-benefit analysis be carried out. To this extent then although the 'desires' of the appropriate person in terms of costs in particular can be taken into account, when taking as the starting point the requirement that the land in fact be remediated, it is suggested that the fact the costs considerations etc can be taken into account does not mean that the requirement to remediation does not operate as an exclusionary reason. Costs can only be taken into account in certain ways and under restricted terms. Thus some reasons for action are ruled out and Raz's definition of an obligation is met.

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[317] EPA 1990, Section 78E(4).
[318] DEFRA, *supra* n297, Annex 3, Para C.29-C.43.

Finally then, and perhaps most problematically, we must deal with a Hohfeldian analysis of obligations which requires that there be correlative in the form of a right. In our discussion of the meaning of stewardship, it has already been explained that it is possible for future generations to be holders of rights even if they are not capable of enforcing them.[319] Furthermore, as Brown Weiss highlights "there is no theoretical basis for limiting such rights to immediately successive generations. If we were to do so, we would often provide little or no protection to more distant future generations".[320] It is suggested that if the requirement for remediation is to be tied to a right, this right must be in part also a right held by the current users of the land not to be harmed by the contaminating substances on the land, and in part a right in future generations to receive the land in a state consistent with the promotion of their basic needs and to allow the flourishing of their distinctively human characteristics.

Is this then capable of founding the corresponding duty on the Class B person to remediate their land? Following Raz's approach, we must ask whether the interests behind the right that vests in future generations are sufficient to ground duties in the present generation.[321] We have already outlined above the sorts of interests that are in play here - survival, enjoyment, learning, creativity etc. These interests are, it is submitted, enough to conclude that duties should be imposed on persons today for the benefit of other persons today. Survival certainly justifies many of our current obligations. There is no reason why the same considerations cannot justify the imposition of an obligation on the basis of rights that vest in future generations. As a

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[319] See pages 46-51.
[320] Edith Brown-Weiss, "Our Rights and Obligations to Future Generations for the Environment" (1990) 84 *American Journal of International Law* 198 at 202.
[321] Joseph Raz, *supra* n305.

result, even the Hohfeldian definition of obligation is met if it is understood that future generations are capable of holding rights.

The contaminated land provisions therefore do seem to place the obligation to remediate outlined above onto the shoulders of the owner where there is no Class A person, and the obligation to grant rights to the Class A person to allow them to remediate the land where there is a Class A person. The regime does so because of the rights over the land, to decide its future, to grant access etc, that this person, the owner, holds. The obligation is dependent on their holdings rights. Thus far the regime coincides with the hallmark of stewardship. We must determine however whether the obligation here is an obligation for "responsible management and use".

The obligation must be to manage the land in such a way that the resources on and within it, as well as the land itself, are used in a responsible and sustainable way. This is not asking whether the obligation protects these resources for future generations, but simply whether the obligation protects these resources at all. Evidence for the fact that that regime does indeed protect these resources can be found in the standard of remediation that must be reached, and the guidance on this standard in particular.

The standard to which land must be remediated is that it is "suitable for use". If the regime were to be *purely* based on stewardship then the standard would have to be an absolute one to ensure that future generations interests were perfectly served, but the lesser, more practical standard used, does not prevent the conclusion that one of the aims of the regime is to impose stewardship obligations. Suitable for use is defined in the guidance as meaning that, under its current use, the land no longer meets the

definition of contaminated land. That is, the contaminating substance in or under the land, after the remediation has been carried out, must no longer be causing significant harm or posing a significant risk of significant harm. This means that the harms discussed in relation to the aim of the regime, as expressed in its criteria for intervention, must be remedied. We discussed above the nature of these harms in relation to the aim of responsible management of land. The criteria for when land is remediated, i.e. when the 'owner's' obligation is met, is intimately connected then to the aim expressed through the definition of these harms. The final aspect of this hallmark of stewardship is therefore met.

(c) Does the regime ensure that, when considering what constitutes careful and responsible use and management of the land, the owner take account of the needs of future generations?

The conclusion that the contaminated land provisions do place an obligation on the owner of land to ensure that the land resource under his control is managed effectively and responsible is only the first step in establishing that a stewardship obligation is thereby imposed. It must also be concluded that the obligation imposed contains within it a requirement that the owner of the land take account of the needs and interests of future generations when deciding what constitutes such responsible use. In relation to the contaminated land provisions, in order to determine whether that is the case here, we will look at the role of the future within this regime and how this interacts with the standard of remediation and process of remediating.

Firstly then in relation to the standard of remediation that must be reached and whether this takes account of the needs of future generations, there are two problems.

The regime talks of the standard of remediation in terms of the current use of the land. Additionally when it does talk of taking into account what may happen in the future, this consideration is always bound by the criteria of foreseeability. It is argued here however that this does not mean that the needs of future generations are not taken into account at all, but simply that they are curtailed. The reason for this curtailment will be looked at in more detail in the section of this paper discussing the conclusions reached about the fit between the contaminated land provisions and stewardship,[322] but it is enough to note here that curtailing the distance we must look into the future does not necessarily mean that future interests are not taken into account.

In order to demonstrate this, the first step is to look at the notion of "suitable for use". This means, as the guidance makes clear, suitable for current use: "the aim of any remediation should be to ensure that the circumstances of the land are such that, in its current use… it is no longer contaminated".[323] Again this is not an absolute standard, but a practical one based on the philosophy that present users of the land should be protected as well as future generations, but that a balance must be struck between these interests. Current use is defined as the use which is permitted without need for a new planning permission. This is quite a narrow range and so the term 'current use' really does mean current use here - a change from general industrial to business use would be enough to take the new usage outside the scope of the contaminated land provisions.[324] Similarly, when defining what constitutes a significant possibility of a significant harm the guidance stipulates that the harm can

[322] See pages 134-142.
[323] DEFRA, *supra* n297, Annex 3, Para C.17.
[324] Town and Country Planning (Use Classes) Order 1987- this change the use from B2 to B1.

only be to current users of the land or users foreseeable under the current use. As a result, land must be remediated to the standard where current users or users foreseeable under the current use will not be harmed. This means that a change of use may mean that the land becomes "contaminated again".

This criterion then does not take account of future interests in the land except where those future interests are taken to be identical to the current interests in the land (since the land will be being put to the same use). Where it does explicitly refer to the future however (as with potential foreseeable users under the current use) it does so only as far as is foreseeable. This can be seen in Table B in relation to "building effects". The guidance states that there is a significant possibility of significant harm (and so land will not have been remediated to the required standard) where: "harm… is more likely than not to result from the pollutant linkage in question during the expected economic life of the building (or, in the case of a scheduled Ancient Monument, the foreseeable future)".[325] There is an explicit view to the future here, but this is quite a narrow requirement, and it is relatively unusual within the regime itself. There is no requirement to take account of the needs of future humans *per se,* except in so far as their interests will be considered if the use of the land remains the same. It is therefore difficult to conclude that the standard of remediation and thus the content of the obligation that rests on the landowner is an obligation to take account of the needs of future generations beyond the narrow band of 'future' persons within the framework of current use and foreseeability.

There is however one area within the regime where the needs of future generations are explicitly taken into account, and this is through the requirement of continuing

[325] *Ibid*, Annex 3, Table B.

monitoring that can form part of the remediation package. This monitoring requirement will mean that the state of the land continues to be kept under observation, potentially beyond the current use. The only reason why there would be a requirement for monitoring is to benefit future generations since by definition the land would be remediated to the point where it is not causing harm to current users. This monitoring requirement also means that future generations will come under an obligation to the generations beyond them.

The guidance makes clear that in most circumstances: "The phasing of remediation is likely to follow a progression from assessment actions, through remedial treatment actions and onto monitoring actions".[326] Such monitoring requirements should be imposed where, "the authority will need to consider whether any further remedial treatment action will be required as a consequence of any change that may occur".[327] This monitoring can only be used in relation to the existing identified pollutant. It cannot be used to discover whether there is a new contaminant causing harm. It is designed to discover whether the land has indeed been cleaned up, but it does so with a view to *any* change which may occur. It is submitted that it may therefore be a back route to taking account of a change of use. If there is a monitoring requirement in place and the use of the land changes, the monitoring requirement helps to protect the interests of those users of the land under its new use. These individuals are protected throughout the remediation process by system of monitoring.

It seems then that there may be a "back door" method of taking account of the needs of future generations through the monitoring requirement in a way which is not

[326] *Ibid*, Annex 3, Para C.13.
[327] *Ibid*, Annex 3, Para C.68(b).

restricted by foreseeability and current use. The main thrust of the regime however is not to take account of future generations generally, but a restricted subset of future generations. This hallmark is therefore met only to a limited extent.

(d) Do the provisions burden the rights of the owner with the obligations of stewardship?

Before explaining this lack of fit however it is necessary to look at the fourth hallmark. It seems then that there is no doubt that the contaminated land provisions do impose obligations on Class B persons whether or not there is a Class A person. We must ask now however whether this obligation burdens their ownership rights. In order to determine this, the place of the owner where there is a Class A person will first be examined. From here the definition of owner for the purposes of determining who is a Class B person will be looked at, along with the exclusion tests which operate when there is more than one Class B person. It will be seen that the regime attempts as far as possible to impose the obligation outlined here onto that person who is best placed to make decisions about the land such that they are subject to stewardship duties.

Firstly then, where there is a Class A person, we have outlined that the obligation lying on the owner or occupier of the land will be to grant rights of entry and other rights that are necessary for the Class A person to carry out the steps required of them by way of remediation.[328] How does this relate to our definition of the steward? Certainly the obligation is not phrased in terms of decision-maker, but it seems reasonable to suppose that the person who has the power to grant rights of entry will

[328] See page 23.

be the person entitled to control access to the land. This is one of the crucial decision-making powers outlined above. Similarly, the person granting the rights will normally be the person who in ordinary circumstances would control what works are carried out on the land. In reality then this person will probably be the very same person described as the steward for the very reason that the rights required to grant the rights of entry etc will be those same rights that would be required to make stewardship decisions. The obligation arises because of the rights that they hold. These rights are what make them owner and therefore mean that they fall under stewardship obligations. Thus the rights are granted because of their position as owner.

The same can be said when we consider the position of Class B persons. Class B persons are defined as the owner or occupier of the land for the time being. This alone indicates that we are probably dealing with the type of person capable of falling under stewardship obligations. Owner is defined in section 78A(9) EPA 1990 as the person entitled to receive the rack rent. This means that in most cases the owner will be the freehold owner but in certain circumstances a leasehold owner entitled to receive rack rent will also be the owner. Regardless of the title that they hold however a person entitled to receive such rent will normally have sufficient rights to make decisions about the land. Occupier is not defined in the legislation and there has been little case law discussion on the point. In all likelihood, following the approach of other areas of the law,[329] the question is probably going to be one of control. Although it is dangerous to take a definition of a term from one area of law

[329] *Stevens v Bromley London Borough Council* [1972] Ch. 400.

and import it into another, this definition does seem to tally with the general tenor of the provisions.

There is however more evidence that the Class B person who will be held responsible for remediation will be the person we have defined as capable of being the steward. This is to be found in the statutory guidance. Firstly, it is made clear that the decision here has nothing to do with financial circumstances.[330] This is not about who is best placed to pay. Secondly, the exclusion tests in the guidance give the enforcing authority an indication as to who out of the current owners and occupiers should not be held responsible for remediating the land because such persons are not seen as suitable to fall under this obligation. Such unsuitable persons are occupiers who occupy under a licence which they cannot transfer or which has no market value and a lessee who pays rack rent.[331] Such persons will not however be excluded under Para. D.90 if this would mean that there was no appropriate person left. This makes sense because in such circumstances of the stock of identified persons this person will remain the most suitable to make decisions about the land because there is no one else. Thus the fourth hallmark of stewardship is met.

(e) Does the regime impact on the decision-making processes of the land owner?

As we established in our discussion of the meaning of steward,[332] it is not enough that the obligation is to ensure that the land is managed in a responsible way for the benefit, at least in part, of future generations. Instead, the system must attempt to ensure that the decision-making process itself involves the interests of future

[330] DEFRA, *supra* n297, Annex 3, Para D.35.
[331] *Ibid*, Annex 3, Para D.89.
[332] See pages 89-99.

generations. As a result, it is necessary, in discussing this fifth hallmark, to look in detail at the decision-making process involved in the implementation of the contaminated land provisions. Firstly the task of the local authority to inspect their land will be examined. From here there will be discussion of voluntary remediation and the processes involved here, and then involuntary remediation which involves a remediation notice. It will be seen that although the owner is involved in the decision-making, it is essentially the enforcing authority which is left to determine the balance that will be struck between the needs of future and present generations.

Before looking at the decision-making process itself however it is necessary to outline the route that goes into ensuring that remediation takes place. The first step under section 78A(2) EPA 1990 is that the local authority, following its duty in section 78B(1) EPA 1990 to inspect land in its area, makes an initial determination that the land is contaminated land. This brings the whole mechanism into play. Once this has been determined, the enforcing authority must notify various parties including the owner and occupiers of the land whether or not they fall into the category of appropriate person under section 78B(3)(b) and (c) EPA 1990. We have already established that the owner of the land will fall under an obligation regardless of whether they are an appropriate person or not and so it does seem appropriate to inform them of this initial determination.

From here, the enforcing authority is charged to ensure that remediation to the required standard takes place in relation to the land.[333] In order to do this the enforcing authority must serve a remediation notice onto any person who it appears to them is an appropriate person. They must endeavour to consult with any person

[333] EPA 1990, Section 78E.

who will be served with the notice[334] and any owner or occupier of the land.[335] This obligation to consult does not apply where there is a risk of imminent danger to the land if the remediation is not carried out immediately.[336] Crucially, the authority cannot serve a remediation notice if it appears to them that those things which would be required by the remediation notice have already been or will be carried out voluntarily under section 78H(5)(b) EPA 1990. If this does happen, then the person who will voluntarily carry out the remediation must prepare a remediation statement.[337] The alternative to this route is that the enforcing authority exercises its powers under section 78N EPA 1990 and carries out the remediation itself, recovering the cost of this from an appropriate person under section 78P EPA 1990.

It is this process that poses the most difficulty for the argument that the contaminated land provisions impose stewardship obligations onto the owners of land. At this stage it is necessary to sketch out where there is a lack of fit and how we should understand what takes place when decisions are made under the contaminated land provisions. The first difficulty arises when it is acknowledged that it is the local authority who, charged with making the assessment as to whether land is contaminated, must decide that harm is being caused to present and future generations as a result of the state of the land in question. The owner of the land is not charged with making this assessment. If we take the state as the entity to which the land owner will be answerable for failures to meet his stewardship obligations,[338] then the initial determination stage bypasses the involvement of the steward. The

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[334] EPA 1990, Section 78H(1)(a).
[335] EPA 1990, Section 78H(1)(b) and (c).
[336] EPA 1990, Section 78H(4).
[337] EPA 1990, Section 78H(7).
[338] See pages 129-133.

steward is not asked on an on-going basis to assess whether he is meeting his obligations. Instead the local authority simply assesses this for him. To this extent then it could be said that the determination of the local authority represents the *answerability* aspect of the stewardship obligation, as opposed to the decision-making part.

In fact, the bringing into play of the whole regime can be seen as an expression of answerability for failure to take account of the needs of future generations, rather than forming part of the steward's decision-making processes. That is, the regime is a hybrid of answerability and of decision-making. Our task in this section is to determine which aspects of the regime represent the need to call the steward to account for his decisions, and which aspects of the regime are truly concerned with deciding how the land should be recovered for the benefit of future generations.

Once the owner of the land is informed that his land is contaminated within the meaning of the regime under the enforcing authority's duty to notify its initial determination, the 'buck' rests with the owner of the land. He is able to decide that he will voluntarily remediate the land or voluntarily grant rights to others to do so. If he decides that this is the route he will take, as long as the end result will be the same or better than if the enforcing authority served a remediation notice, the owner of the land will be entitled to make decisions about the process of remediation himself. The remediation works he intends to carry out will be supervised and reviewed by the enforcing authority through the remediation statement. [339] The process within the

[339] DEFRA, *supra* n297, Annex 2, Para 8.23. This requirement to keep under review the remediation which has taken place is not a statutory duty. It does not form part of the legislation or the statutory guidance, but it does form part of the instructions to local authorities as to how to go about applying

regime then alternates between allowing the land owner to make decisions, and calling him to account for these decisions.

Where the owner decides not to carry out voluntary remediation, the enforcing authority is left to determine how the remediation should in fact be carried out. This, it is suggested, is not a matter of answerability. Here the enforcing authority will make the *decision* as to how the owner of the land must carry out his stewardship duties. In doing so however it must at least take account of the land owner or occupier's views. This will allow the owner of the land, even where the remediation is in fact to be carried out by a Class A person, to express their views as to the best and most practicable way to manage the state of the land. The owner is not constrained by any controls in what he proposes in this consultation. The enforcing authority, by contrast, can only require by way of remediation that which is reasonable. We have above discussed the factors that go into this and so the enforcing authority must itself take account of the needs of future generations when assessing what is proposed by the land owner. It then reviews his comments in this light. Again this, it could be argued, is a form of accountability. The land owner's comments can only be taken into account where they will lead to successful and reasonable remediation of the land to the required standard.

Crucially however, where the enforcing authority is to carry out the remediation itself, it does not need to serve a remediation statement and so does not need to consult the land owner. There are limitations as to when the enforcing authority can carry out the remediation itself, as specified in section 78N EPA 1990. Under section

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the contaminated land provisions and therefore will be followed. The enforcing authority would be vulnerable to judicial review of any decision not to follow this non-statutory guidance, for example.

78N(3)(b) EPA 1990 the enforcing authority can carry out the remediation, at the cost of the appropriate person, where the appropriate person has entered into a written agreement to this effect. In cases such as this the appropriate person essentially contracts the remediation out to the enforcing authority and in doing so makes a decision that the enforcing authority is to carry out this work. This is not a case where decision-making is taken away from the landowner.

There are circumstances within the section however where the landowner will be entirely robbed of his ability to make decisions about the remediation steps that will be taken on the land. This is especially so where the enforcing authority decides to act under section 78N(3)(a) EPA 1990 which specifies that the enforcing authority can carry out the remediation itself "where [it] considers it necessary to do anything itself by way of remediation for the purpose of preventing the occurrence of any serious harm". In such circumstances it is true that the land owner may have made the decision to allow the land to get into its current state, and to that extent this move by the enforcing authority will make him accountable for that. Alternatively however it could have been the result of the actions of a neighbour, or of a previous owner. Thus it is clear that this is not always going to be an issue of accountability.

In order for the role of the enforcing authority to be limited to calling the steward to account, the decision over how to remediate should however be made by the land owner, at least in part, if this decision is to be made in accordance with a system of stewardship, and that will not always be the case here. Again the enforcing authority can act under section 78N(3)(e) EPA 1990 where it decides that it will not recover all or some of the cost of remediation. This may not harm the land owner of course, since he may not have to pay for any of the remediation to take place even if he is an

appropriate person, but he is once again robbed of his power to take decisions of what course the remediation will follow.

There are some circumstances then, even though most enforcing authority intervention is about accountability, where the decision-making process adopted by the contaminated land provisions is not the process which is essential to a system of stewardship. The reason for this is discussed below, and it is suggested that this tells us as much about regulating on the basis of stewardship obligations as it does about the contaminated land provisions, but it does pose problems for the argument that the regime imposes stewardship obligations.

(f) Do the provisions ensure that the decision-maker is answerable for failures to meet his obligations? Is the state a suitable vehicle for this answerability?

Finally, we still must demonstrate that the sort of accountability encountered here is compatible with systems of stewardship. Is decision-making and review by the enforcing authority an appropriate system of answerability and accountability for a stewardship regime? We will discuss here, firstly, the role of the enforcing authority, and secondly the role of the courts. It is suggested that there are two forms of accountability in play and that each is compatible with a system of stewardship.

The enforcing authority, as has been established, has an important accountability role throughout the process introduced by the contaminated land provisions. Most crucially however, it is the enforcing authority that is charged with the implementation of the regime. In relation to its on-going supervision - through inspection of land to determine whether it is contaminated, to on-going monitoring of

the remediation works - the enforcing authority is tasked with ensuring that the owner complies with his stewardship obligations. Is this accountability sufficient to meet the requirement that the steward be answerable? Is the enforcing authority suitable to act in this role? As far as the first question is concerned, it is submitted that the local authority involvement in the decision-making process is sufficient as a tool for ensuring accountability. At all stages the guidance and legislation directs the local authority and as we have seen above these provisions contain sufficient information for the local authority to ensure that the overriding stewardship obligation that is contained within these provisions is complied with.

It is also argued here that the local authority is a suitable candidate for enforcer of the obligation. We have established that the rights introduced by the provisions vest in future generations. As a result these generations cannot themselves protect their rights. In Attfield's terms, a proxy is required.[340] This proxy must not only represent the interests of future generations as expressed in the legislation, but must also not detract from the focus on localised decision-making represented by stewardship. A local authority is well suited to this task. It has sufficient knowledge of the local area, and sufficient powers, to ensure that the steward acts responsibly. It is also an integral part of the democratic process. Although local authorities are put together on the basis of current needs and preferences as expressed through elections, they can also act as representatives of the future. The members of a local authority have wide-ranging expertise and views and so it is legitimate to allocate the task of accountability to the local authority.

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[340] See page 74.

It must be noted here however that the Environment Agency is not an elected body and so when a site is designated as a special site such that it falls under the control of the EA, the decision-making process is no longer part of this democratic process. This does not however prevent our conclusion that the EA can have an important role to play in this system and that this role is compatible with the overall idea that the state is the appropriate forum for accountability. The EA only becomes involved in particular cases and significantly it does so once the local authority has informed them of the contamination. The local authority therefore still starts the process of accountability. In addition, the EA is an expert body and whilst the elected nature of local authorities is useful for many cases of contaminated land, where the decisions to be made are not primarily scientific, but costs-based and political, the scientific and environmental expertise of the EA has a crucial role to play in the overall provision of information into the accountability process.

The enforcing authority also has another task in terms of accountability. If they believe that prosecution for the offence of failing to comply with a remediation notice will be insufficient, they can also ensure that the remediation notice is carried out by bringing an action in the High Court. It is thus a matter for the enforcing authority to decide that the normal sanction for failure to comply with the stewardship obligations is insufficiently strong in a particular case. Again it seems appropriate to allocate this task to the enforcing authority since they will be aware firstly of the urgency and importance of ensuring compliance with the remediation notice, and secondly, through their negotiations with the land owner, the likelihood of a small fine representing a sufficient sanction.

The courts will however have a crucial role to play, both in ensuring compliance with the remediation notice in assessing whether the offence of non-compliance has been committed, and in assessing whether another sanction should be imposed in proceedings in the High Court. The final question we must ask then in analysing the regime, is whether the role of the court as reviewer of the land owner's actions is compatible with a regime based on stewardship. It seems that it is. The court (in cases where the remediation notice is served by the Environment Agency, the Secretary of State has these powers)[341] can review the contents of the remediation notice to ensure that it complies with the legislation and the guidance; it can hear appeals on the designation of a person as an appropriate person; it can determine whether the owner of land has committed an offence by not granting rights of entry etc or by not complying with a remediation notice; and it can decide whether the ensuring fine is sufficient in the circumstances. The courts in this sense then have the final say as to whether the obligations in the regime have been complied with and what action must be taken to ensure this.

We established above that the key to the steward is that he is able to make the final decision about the fate of his land, and that this decision be recognised by society as such. Does the role of the court as final decision-maker here mean that the owner of land cannot be considered the steward? It is submitted here that it does not for the reason that the court acts as the final reviewer, the final assessor of accountability. The court will determine whether the stewardship obligations have been breached, and its decision on this is final.

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[341] Appeals against remediation notices served by the Environment Agency are made to the Secretary of State, EPA 1990, Section 78L(1)(b).

The final decision on the fate of the land however, if he complies with his stewardship obligations to their fullest extent, will rest with the land owner and this is the key to the contaminated land regime as a regime based on stewardship. As long as the land owner behaves as a steward should, he will decide the fate of his land in order to promote a balance between the interests of current and future generations. If he fails to do so the mechanism of the contaminated land provisions will review his decisions and call him to account for this. The enforcing authority will be involved in the decision-making process, and will itself make certain decisions. This much is admitted, but it is suggested that the overall shape of the regime is in part one of stewardship.

VII: Explanation of the lack of fit between the provisions and the hallmarks of stewardship

There are therefore two key areas where there is a lack of fit between our hallmarks of stewardship and the regime. The first, and most important area of conflict is where the land owner is not the primary decision-maker in terms of the process of remediation.[342] Secondly, the interests that are protected are not framed in terms of the future *per se* but rather under current use and use possible under the current planning permissions with any references to the future limited by foreseeability.[343] Is it possible then to conclude then that this regime is a 'good example' of stewardship, and if so, how? There is no question that the contaminated land provisions do not impose a 'pure' stewardship regime, nor has this thesis attempted to prove that. Instead, it is suggested, that there is an important aspect of this regime which is overlooked. Despite the regime not being a perfect example of stewardship, there is good reason for this lack of complete fit. The lack of fit should not prevent us from interpreting the regime is such a way as to give best effect to its varied aims, one of which is to ensure that land is maintained for the benefit of future generations.

Both of the major 'misfits' relate to the nature of decisions that must be undertaken in a regime that is based on a philosophy of stewardship. There are two fundamental difficulties with the workability of such a regime- unknowability and unworkability- and the contaminated land provisions manage to solve these difficulties. In doing so the regime may move away from stewardship in some of its elements, but it is

[342] See pages 123-239.
[343] See pages 117-121.

suggested that it would not be possible to operate under a regime based purely on stewardship. Instead, it will be argued, the one of philosophies behind the regime is stewardship and that this philosophy causes the drafters of legislation some difficulty. This difficulty is avoided leading to a compromise, but this does not change the fact that stewardship obligations or something very like them form an integral part of this regime.

(a) The decision-making process

The first problem that must be addressed is whether the decision-making process is compatible with the conclusion that the contaminated land regime imposes obligations based on stewardship. There were three central stages to the decision-making process that caused difficulty.[344] These were: the role of the local authority in making the initial determination that land is contaminated; the limits on the role of the owner of the land in putting together the remediation notice; and finally the possibility that the enforcing authority take charge of the remediation itself thus avoiding consultation with the owner. It is submitted that these difficulties do not prevent the conclusion that the regime is based on stewardship for the reason that these stages in the process represent a necessary compromise between the desire to involve the owner of the land and the need to ensure that remediation is in fact carried out.

Many land owners 'brought up' under the English approach to property ownership[345] will be reluctant, to say the least, to act altruistically in relation to their land and the

[344] See pages 123-129.
[345] See pages 82-89.

contaminated land provisions solve this problem. The prevailing approach to land ownership is that land is a resource available for use by the owner; not that land is a burden that entails obligation. This problem of approach is one that the contaminated land regime does not attempt to tackle head-on, but instead tries to avoid. For most, land is the most valuable asset they possess and many will want, and perhaps more crucially, need, to maximise this financial value. It goes without saying that remediated land is likely to be more valuable then contaminated land in the long-term, but this does not mean that the owner will have the financial ability to carry out the remediation works in the short-term. It is also true that the land owner may not recover the costs of remediation quickly. Leaving the owner as primary decision-maker may therefore be an inefficient way to ensure that the aims of stewardship are met since there will not always be a strong, or indeed any, financial incentive for the owner to remediate the land due to the heavy initial outlay of money required.

There are two potential solutions to this. The first is to regulate on the basis that personal preference should be removed from the picture such that the 'decision' is taken out of the land owner's hands. The second is to attempt to regulate in order to change personal preference. The second solution would be more compatible with the ethics of stewardship, but significantly more difficult and less likely to be immediately successful. The first option, the one taken by the contaminated land provisions, takes some elements of the decision out of the land owner's hands, either through allowing the state to make the decision, or by making the decision-maker strictly answerable to the state. The contaminated land provisions, it has been suggested, take both of these approaches at different places within the regime.

The first option, viz. total delegation of decision-making to the state, can be seen where the enforcing authority uses its powers to intervene and carry out the remediation itself where it considers that there is an immediate danger of significant harm. In this case, although the decision to intervene in the first place can be seen as an aspect of answerability to the land community as a whole through its proxy, the state, in that the intervention of the enforcing authority is in itself a sanction to ensure compliance with the obligations of stewardship. On the other hand, the consequent lack of consultation with the owner is indeed related to decision-making. This is however a necessary power if the contaminated land provisions are to have any real bite, especially in cases of some urgency. The consultation requirements will certainly delay proceedings, and in cases of self-interest, the owner can use these requirements to his advantage to limit the scope of his liabilities in costs or to remediate. If the end-goals of the stewardship ethic are to be met, the owner of land cannot be permitted to behave in this way. This aspect of the regime simply recognises that self-interest cannot be allowed to override its wider objectives.

The regime too adopts the 'strict' approach to answerability. It is extremely problematic to attempt to introduce an obligation based on subjective consideration. At its most simple level it is almost impossible to oblige someone to think in a certain way. As a result, the owner is made answerable, not for whether he truly considered the needs of future generations when assessing how to manage his land, but whether the end result of his decision-making promotes these needs. This will generally only happen however where the owner has not become involved, at a much earlier stage, in voluntary remediation. Most contaminated land is being cleaned up

through voluntary remediation regulated through the planning process.[346] The local planning authority will grant planning permission only, in many cases, if the land is remediated but the owner can simply conclude that he will not carry out his proposed development. He is able to decide that he would rather manage his land in its contaminated state.

At this stage the enforcing authority may step in and identity the land as contaminated. When this is done a strict assessment is made on the outcome of the owner's decision-making, not on the process. Again when the enforcing authority consults the land owner in the composition of the remediation notice, if the land owner makes contributions which are in fact in the interests of future generations as expressed in the standard 'suitable for use', then the authority will take account of this decision and filter the information into the remediation notice. If however the owner's preferences for the method of remediation are not in fact in accordance with these future interests, even if the owner believes that they are or has given extensive thought to the balance between current and future interests, the enforcing authority may not include them in the remediation notice.

The regime attempts to make it in the owner's self-interest, at least in part, to act on the basis of trying to promote the interests of future generations. This means that the regime, rather than attempting to rely on the land owner acting altruistically, actually seeks in places to change the balance of the owner's self-interests by giving him increased decision-making power when he does attempt to promote the interests of current and future generations. Thus the regime avoids the practical problem of enforceability that a regime based on stewardship inevitably faces and especially so

[346] See also page 33-34.

where the property being considered is land given its durability and central importance to life. It solves the special practical problems related to stewardship of land in a way which is compatible with the underlying philosophy of stewardship.

(b) Future interests and foreseeability.

The same conclusion can be reached in relation to the second problem of the limitation of future interests to those which coincide with present interests under the current use or in some cases those future interests which are foreseeable. Regulatory certainty and predictability would be impossible to achieve if the regime simply stated that the land should be used in such a way as to benefit future generations since these needs are themselves uncertain. There is simply no way of telling at this point what will benefit future generations. As Attfield states, "Current needs are usually discoverable with greater certainty than future needs, and are often more amenable to satisfaction… Present needs, however, should not be prioritised ahead of future needs as such… the rectification of current injustices is often a prerequisite for environmental justice in future generations".[347]

Such a regime would be unworkable or at least unpredictable. As a result the contaminated land provisions restrict the time scale for consideration. The interests of future generations must be taken into account on the assumption that all planning permissions for the land remain static. This has two key results. Firstly, this allows the regime to escape the trap of unknowable information in that it avoids the enforcing authority and the owner needing to guess what uses the land may be put to

[347] Robin Attfield, *The Ethics of the Global Environment* (Edinburgh: Edinburgh University Press, 1999) at 163.

in the future. It also limits the need to take account of the argument that what constitutes a 'good life' may be different in the future.[348] This is not a question over what use land will be put to in the future, but what constitutes 'suitable' in this context. Although we can say for certain that suitable for use might include food which is not harmful when eaten, and potable water, it does not tell us what state a building must be in before we conclude that it is no longer suitable as a stimulus for artistic endeavour. The solution in the regime solves this problem very neatly.

It does not limit the length of time to be taken into account, but closes off options for change over that time. The concept of suitable for use in theory is indefinite if it is assumed from the outset that the planning permission, and therefore the use of the land, is fixed. Thus if it is assumed that Whiteacre will always be used for residential accommodation including homes with children, then it is possible to draw a picture as to what might be harmful to the users of this land indefinitely. Similarly when foreseeability is relied upon, we are asked to calculate future interests only on the basis of information that we can reasonably suppose to be true.

Thus we can reasonably suppose that an ancient monument in a complete state of disrepair will be less inspirational that one in pristine condition, and that 'suitability' will probably be reached somewhere in the middle. Again, when considering protected species and population numbers, we can reasonably suppose that toxic chemicals in the soil will affect the population numbers of animals which eat grain. This would have an adverse impact on future population numbers. The regime would allow action on this. If however the toxins are not passed on through grain, but

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[348] For discussion of the meaning of the 'good life' an ecological context see Holmes Rolston III, "Is there an Ecological Ethic?" (1975) 85 *Ethics* 93 at 95.

instead wash into a nearby river, the impact this may have on flower species in the area might limit bee numbers and prevent grain fertilisation. This might have an impact on the population numbers of species eating the grain, but it is not easy to conclude one way or another that this impact is 'foreseeable'. As a result, any regime which does not limit the scope of future interests that should be taken into account risks becoming unworkable because of the inherent uncertainty. The limitation of foreseeability avoids the problem of lack of scientific knowledge and the approach to the regime advocated in *R (Redland Minerals Ltd) v Secretary of State for the Environment* confirms that the regime is capable of operating even where there is such scientific uncertainty.[349]

The Consultation Paper issued in December 2010 makes clear "decisions will have to be taken in the fact of scientific uncertainty over the nature of risks at sites".[350] Forseeability then allows action to promote future interests where the future is not certain, but not where we can have no idea what impact the current state of the land might have on future. This is again a pragmatic solution to the problem that a system based on stewardship presents and is an effective way of carrying out the balance between future and current interests. The contaminated land provisions in solving the keys problems of regulation on the basis of stewardship are therefore good examples of such regulation. They attempt, at least in part, to ensure the aims of stewardship without falling into the trap of unknowability and unworkability and although this is

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[349] *R (On the application of Redland Minerals Ltd) v Secretary of State for the Environment, Food and Rural Affairs*, [2010] EWHC 913 (Admin), [2011] Env. L. R. 2 at para 18.
[350] United Kingdom, DEFRA, *Public Consultation on Changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990* (London, 2010) at para 47(a).

not perfectly achieved, it is something that this paper suggests should be acknowledged and acted upon.

VIII: What are the implications of this analysis for application and interpretation of the contaminated and regime?

The final issue that this paper will examine then is what implications the argument presented here has for the application and interpretation of the contaminated land provisions. It is clear that if the provisions do indeed place stewardship obligations onto the owners of land then we should approach the question of who should be held responsible for the state of their land from this perspective. It is suggested that this would be quite a significant change to the current approach. The provisions have not received very detailed treatment in the courts.[351] The cases concerned with the regime do not generally engage with the philosophy behind the regime as has been seen above, and what treatment the regime have received implies that the courts and local authorities are reluctant to impose obligations on land owners where they did not cause or knowingly permit the contaminating substance to enter the land, especially when dealing with residential accommodation. This is despite the clear guidance that the financial circumstances and identity of the individual are not to be taken into account except where remediation will cause hardship.[352]

In order to demonstrate this *R (National Grid Gas PLC) v Environment Agency*[353] will be examined in more detail. This key case on the provisions demonstrates that the current approach to interpretation of the regime is inconsistent with the argument presented here as to the underlying philosophy behind the regime. The focus of this case was the position of statutory successors as potential Class A persons and the

[351] See pages 37-39.
[352] EPA 1990, Section 78P(2).
[353] [2007] UKHL, [2007] 1 W.L.R. 1780.

main conclusion of the case seems to be satisfactory in terms of compliance with the regime (even if there might be good policy reasons to abandon the approach outlined). The court concluded that statutory successors to companies which caused or knowingly permitted a substance to enter land will not be responsible for the remediation of the land as a Class A person. The court also had to deal however with the decision of the Environment Agency that they would not pursue the owners of the land to ensure remediation even if there was no Class A person.

Lord Scott in his judgment highlights that: "the agency has a discretion, having regard to hardship that recovery might cause, to decide not to recover the whole or part of its costs from a particular appropriate person… In the present case the agency has made clear its intention not to pursue any of the present owners or occupiers of the 11 residences for recovery of the cost of the remediation works it has carried out at their respective properties".[354] In order to support this argument he draws on section 78P(2). It is certainly true that in determining whether to recover costs the authority is entitled to take account of potential hardship that might be caused in recovering the costs and has a wide discretion in so-doing. It is important however to bear in mind the general approach of the regime which is that land owners, in the absence of a Class A person, should carry out the remediation themselves or meet the costs of the remediation.

When this position is acknowledged, along with the stewardship obligations that the regime imposes, the Environment Agency was perhaps too hasty to conclude that the individual home owners were not to face any of the costs of remediation. The court's attitude seems to mirror this conclusion in paragraph 21 of Lord Scott's judgment

[354] [2007] 1 W.L.R. 1780 at Para 18.

where he agrees with the argument that the legislation was adopted "on the principle that the polluter should pay and that innocent owners or occupiers of contaminated land should not have to pay. I have no doubt that that was so and have no quarrel with that principle". It is suggested that this argument flies in the face of the scheme of the regime. The courts appear to be having difficulty in seeing that this regime is not based on fault. There is no doubt that the regime prioritises the polluter pays principle. This can be seen from the primary liability for cleaning up contaminated land resting on those who cause or knowingly permit substances to enter land, as has been discussed above. Behind this principle, however, there are extensive obligations that rest on the owner of land, 'innocent' or not, and these obligations can be viewed as relying on the concept of stewardship.

It seems then that in this case the court and the Environment Agency were concerned not to impose responsibility onto the owners of the land, despite this aspect of the regime forming a critical plank of its make-up, because they did not consider it to be fair to impose all, or more importantly *any* of the costs onto the residents themselves. The Environment Agency's assessment of their ability to recover costs reflects this reluctance. "Cost recovery can be used to reimburse public funds for remediation costs from appropriate persons, but this has had very limited use".[355] This attitude is repeated at page 32 of "Reporting the Evidence" where the Agency report argues that "it is not always possible to find an appropriate person who may be liable for sites and, in these cases, the taxpayer may ultimately pay for remediating them".[356] Contrary to this argument it is almost always possible to find an appropriate person within the definition given by the regime. The regulatory authorities are reluctant to

[355] Environment Agency, "Reporting the Evidence" (Bristol: 2009) at 26.
[356] *Ibid* at 32.

impose liability onto a person who by definition is appropriate to bear the cost on the ground, one assumes, that this will cause land owners 'hardship'. Of the sites where liability had been determined up to March 2007, government and other public funding had paid for the remediation of 282 sites; Class B persons had paid for just 26.[357]

Local authority policy documents also demonstrate this attitude. The Ribble Valley Borough Council website states for example that "Owners and occupiers of domestic properties are not usually liable for these costs".[358] This is not because there is usually a Class A person to bear the cost of remediation, but because local authorities are reluctant to impose liability onto home owners. Another example, taken from a policy statement of South Oxfordshire District Council, is that local authorities see "The decision to waive or reduce any cost to the Class B person will be to the extent needed to ensure that the Class B person in question bears no more of the cost of remediation than it appears reasonable to impose".[359] The policy of the regime however is not whether it is reasonable to recover costs from land owners.

The policy is that it *is* reasonable to recover costs except where hardship is caused as can be seen from the Government Response to the Second Report of the Environment Committee (Session 1996-1997): Contaminated Land which states that: "the draft statutory guidance has been rewritten and expanded to provide a clear basis on cases where recovery of costs from homeowners and others should be

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[357] *Ibid* at 21.
[358] United, Kingdom, Ribble Valley Borough Council, 12th Oct 2010, <http://www.ribblevalley.gov.uk/a_to_z/service/412/function.simplexml-load-file>.
[359] United Kingdom, South Oxfordshire District Council, "Policy for the Recovery of Remediation Costs for Contaminated Land", 12th Oct 2010, <http://www.southoxon.gov.uk/ccm/content/envhealth/environmental-protection/contaminated-land-pages/contaminated-land-faqs.en>.

waived or reduced".[360] In other words, there is no general policy of not recovering costs from homeowners. Despite this again the Rossendale Borough Council Contaminated Land Inspection Strategy highlights the cost implications of remediation and indicates that the public purse may have to pay for remediation but does not discuss the possibility of requiring home-owners to pay.[361]

Local authorities rely on the concept of 'hardship', but hardship must go beyond being made responsible for the cost of remediation where the person did not cause or permit the contamination. Certainly the total cost of remediation may be too much for home owners to afford, but this does not mean that they will suffer hardship by making even a small contribution. This paper has attempted to show that there are very important considerations with strong ethical justifications based on justice to future generations which would make it fair to impose liability for the cost of remediation onto the landowners in these circumstances.

As a result, it is suggested that the approach which sees liability where there has been no action leading to the contamination as unjustified is missing a significant element of the philosophy and reality of the regime. The regime represents a move away from the liberal absolute conception of property rights which sees property as an asset as opposed to a liability and yet thus far the approach used in applying the regime has not recognised this. Perhaps this is why the contaminated land provisions are seen as a classic case of regulatory failure -[362] the philosophy behind the regime is not

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[360] United Kingdom, Environment, Transport and Regional Affairs Committee, "Government Response to the Second Report of the Environment Committee (Session 1996-1997): Contaminated Land- Report and Proceedings of the Committee" (London: HMSO, 1999) Page xiii, para 47.
[361] United Kingdom, Rossendale Borough Council, "Contaminated Land Inspection Strategy" (Rossendale: 2003), at pages 32-33.
[362] Stephen Vaughan, "The Contaminated Land Regime: Still Suitable for Use" [2010] *Journal of Planning Law* 142 at 142.

feeding into the interpretation and application of its provisions and with 90% of identified contaminated sites being currently used for housing,[363] this problem has serious implications for the success of the regime.

[363] *Ibid* at 146.

IX: Conclusion

Drawing all these threads together then, what can be distilled from this discussion is that although the contaminated land provisions do to a large extent embody the notion of polluter pays, they do so in part against a background of stewardship, and this should be recognised when applying and interpreting the regime. In order to demonstrate this, extensive consideration was given to the meaning of stewardship. By looking at the justifications for stewardship as a moral principle, it was possible to determine that stewardship looks to create a balance between the needs of the present and the interests of the future. These interests are both anthropological and ecological and apply to the whole range of factors that go into land resource use and management. Both intergenerational and interspecies justice and religious justifications look to stewardship as the key to responsible land ownership.

In order to give effect to this moral principle, a legal regime based on stewardship must impose an obligation on the person most entitled to take decisions over the future of land to manage his land responsibly with a view to protecting future interests and it must do so with the aim of ensuring that the basic needs of future humans are protected, along with those things needed to allow the flourishing of distinctive human characteristics. The obligation must change the decision-making process employed by the owner of land and he must be accountable for the decision reached.

The contaminated land provisions to a large extent meet these requirements. Where the requirements are not fully met - when the regime limits the scope of future interests that can be taken into account, and where local authorities becomes decision-makers in place of the owner of the land - the lack of fit can be explained by the difficulties of regulating on the basis of stewardship. The fit is not perfect, but this does not mean that we cannot consider stewardship when looking at the regime. This tells us much about how we should interpret the contaminated land provisions, and above all it demonstrates that there are good reasons grounded in justice why land owners who did not cause or permit contamination of their land should still be liable to remediate the land or to pay, at least in part, for that remediation. It is hoped that this conclusion will be taken on board by those applying the regime. The biggest barrier to solving the problem of historical contaminated and allowing the state of land to be improved for the benefit of successive generations is funding and owners of land are not being made to pay their share of the costs. It is time, it is suggested, that the contaminated land provisions are understood in light of their aims and the philosophy behind them and applied accordingly. The regime does challenge the traditional liberal property theory and we should recognise this rather than attempting to mitigate against this challenge.

Bibliography

Books

Attfield, Robin. *The Ethics of Environmental Concern*. Oxford: Basil Blackwell, 1983.

Attfield, Robin. *The Ethics of the Global Environment*. Edinburgh: Edinburgh University Press, 1999.

Barry, John. *Rethinking Green Politics*. London: Sage Publications, 1999.

Bell, Stuart and McGillivray, Donald. *Environmental Law 7th Ed*. Oxford: Oxford University Press, 2008.

Blackstone, William. *Commentaries on the Laws of England*. Chicago: University of Chicago Press, 1979.

Black, John. *The Dominion of Man*. Edinburgh: Edinburgh University Press, 1970.

Brown, Vincent. *Environmental Pollution Law and Commercial Transactions*. London: Butterworths, 2002.

Cole, Daniel H. *Pollution and Property: Comparing Ownership Institutions for Environmental Protection*. Cambridge: Cambridge University Press, 2002.

Coyle, Sean and Morrow, Karen. *The Philosophical Foundations of Environmental Law: Property, Rights and Nature*. Oxford: Hart, 2004.

Davies, Margaret. *Property: Meanings, Histories, Theories*. Abingdon: Routledge-Cavendish, 2007

Denman, Donald R. *Origins of Ownership*. London: George Allen & Unwin Ltd, 1958.

Dobson, Andrew. *Green Political Thought*. London: Routledge, 2007.

Dodgshon, Robert A. *Land and Society in Early Scotland*. Oxford: Clarendon Press, 1981.

Dryzek, John S and Schlosberg, D. *Debating the Earth: The Environmental Property Reader*. Oxford: Oxford University Press, 2005.

Edwards, Martin et al. *Contaminated Land*. Welwyn Garden City: CLT Professional Publishing Ltd, 2000.

Epstein, Richard. *Takings: Private Property and the Power of Eminent Domain*. London: Harvard University Press, 1985.

Gardner, Simon. *An Introduction to Land Law*. Oxford: Hart Publishing, 2007.

Gaunt, Jonathan and Morgan, Paul. *Gale on The Law of Easements*. London: Sweet & Maxwell, 2008.

Gillespie, Alexander. *International Environmental Law, Policy and Ethics*. Oxford: Oxford University Press, 1997.

Goldstein, Robert J. *Ecology and Environmental Ethics: Green Wood in the Bundle of Sticks*. Aldershot: Ashgate, 2004.

Harpum, Charles et al. *Megarry and Wade: The Law of Real Property*. London: Thomson Reuters, 2008.

Hart, Herbert L. A. *The Concept of Law*. Oxford: Oxford University Press, 1994.

Hayward, Tim and O'Neill, John. *Justice, Property and the Environment: Social and Legal Perspectives*. Aldershot: Ashgate, 1997.

Hellawell, Trevor. *Blackstone's Guide to Contaminated Land*. London: Blackstone, 2000.

Holder, Jane and MacGillivray, Donald (eds). *Locality and Identity: Environmental Issues in Law and Society*. Aldershot: Ashgate Dartmouth, 1994.

Honoré, Tony. *Making Law Bind*. Oxford: Clarendon Press, 1987.

Hunter, James. *The Making of the Crofting Community*. Edinburgh: John Donald Publishers Ltd, 1976 (1995 ed).

Kelsen, Hans. *General Theory of Norms*. Oxford: Clarendon Press, 1991.

Light, Andrew and Rolston III, Holmes. *Environmental Ethics*. Oxford: Blackwell Publishing, 2003.

Lunney, Mary and Oliphant, Ken. *Tort Law: Text and Materials*. Oxford: Oxford University Press, 2003.

McBride, Nicholas and Bagshaw, Roderick. *Tort Law*. Harlow: Pearson Education Series, 2005.

McCoubrey, Hilaire. *The Obligation to Obey in Legal Theory*. Aldershot: Dartmouth Publishing Company Limited, 1997.

McFarlane, Ben. *The Structure of Property Law*. Oxford: Hart Publishing, 2008.

Macinnes, Allan I. *Clanship, Commerce and the House of Stuart, 1603-1788*. East Linton: Tuckwell Press, 1996.

Macpherson, Crawford B (ed). *Property: Mainstream and Critical Positions*. Toronto: Toronto University Press, 1978.

Mill, John S. *On Liberty and Considerations on Representative Government*. London: Dent, 1993

Partridge, Ernest. *Responsibilities to Future Generations: Environmental Ethics*. New York: Prometheus Books, 1981.

Passmore, John. *Man's Responsibility for Nature, 2nd Ed*. London: Duckworth, 1980.

Pejovich, Svetozar. *The Economic Foundations of Property Rights*. Cheltenham: Edward Elgar Pub., 1997.

Pennock, J Roland and Chapman, John W. (eds). *Nomos XXII: Property*. New York: New York University Press, 1980.

Rawls J. *Political Liberalism, Expanded Edition*. Chichester: Columbia University Press, 2005.

Raz, Joseph. *Ethics in the Public Domain*. Oxford: Clarendon Press, 1994.

Raz Joseph. *The Morality of Freedom*. Oxford: Oxford University Press, 1986.

Raz, Joseph. *Practical Reason and Norms*. London: Hutchison & Co Ltd, 1975.

Reeve, Andrew. *Property*. London: Macmillan, 1986.

Rodger Alan. *Owners and Neighbours in Roman Law*. Oxford: Oxford University Press, 1972.

Rose, Carol. *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership*. Oxford: Westview Press, 1994.

Singer, Joseph W. *Entitlement: The Paradoxes of Property*. New Haven: Yale University Press, 2000

Singer, Peter. *Animal Liberation: A New Ethic for Our Treatment of Animals*. London: Jonathan Cape, 1976.

Taggart, Michael. *Private Property and Abuse of Rights in Victorian England*. Oxford: Oxford University Press, 2002.

Tromans, Stephen and Turrall-Clarke, Robert. *Contaminated Land 2nd Ed*. London: Sweet & Maxwell, 2008.

Tromans, Stephens and Turrall-Clarke, Robert. *Contaminated Land: The New Regime 1st Ed*. London: Sweet & Maxwell, 2000.

Watson, Alan. *The Digest of Justinian*. Philadelphia: University of Pennsylvania Press, 1998.

White, Alan R. *Rights*. Oxford: Clarendon Press, 1984.

Zimmerman, Michael J. *The Concept of Moral Obligation*. Cambridge: Cambridge University Press, 1996.

Articles

Anon, "Audacious Bid to Value the Planet Whips up a Storm". (1998) 395 *Nature* 430.

Anon (trad). "The Brave Little Parrot". Viewed 28/09/10. http://www.healingstory.org/treasure/little_parrot/brave_little_parrot.html

Babcock, Hope M. "Should *Lucas v. South Carolina Coastal Council* Protect Where the Wild Things Are?, Of Beavers, Bob-o-Links, and Other Things that Go Bump in the Night". (1999-2000) 85 *Iowa L. Rev*. 84.

Barrett, Christopher and Grizzle, Ray. "A Holistic Approach to Sustainability Based on Pluralism Stewardship". (1999) 21 *Environmental Ethics* 23.

Brennan, Andrew and Lo, Yeuk-Sze. "Environmental Ethics". First published, 2008: viewed 28/09/10. http://plato.stanford.edu/entries/ethics-environmental/

Brown Weiss, Edith. "Our Rights and Obligations to Future Generations for the Environment". (1990) 84 *American Journal of International Law* 198.

Brown Weiss, Edith. "The Planetary Trust: Conservation and Intergenerational Equity". (1983-1984) 11 *Ecology Law Quarterly* 495.

Byrne, J Peter. "Green Property". (1990) 7 *Constitutional Commentary* 239.

Cairns, John W. "Craig, Cujas, and the Definition of *feudum*: Is a Feu a Usufruct?" in Birks, Peter (Ed) *New Perspectives on the Roman Law of Property*. Oxford: Clarendon Press, 1989.

Calabresi, Guido and Melamed, A Douglas. "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral". (1971-1972) 85 *Harvard Law Review* 1089.

Caldwell, Lynton K. "Land and the Law: Problems in Legal Philosophy". [1986] *University of Illinois Law Review* 319.

Caldwell, Lynton K. "Rights of Ownership or Rights of Use? - The Need for a New Conceptual Basis for Land Use Policy". (1973-1974) 15 *William & Mary Law Review* 759.

Carriage, Rebecca and Ennis, Oliver. "Environmental Protection Act 1990 Part 2A: where does the National Grid Gas case leave practitioners?". [2007] *Journal of Planning Law* 1557.

Constanza, Robert et al. "The Value of the World's Ecosystem Services and Natural Capital". (1997) 387 *Nature* 253.

Corkin, Joseph. "Science, legitimacy and the law: regulating risk regulation judiciously in the European Community". (2008) 33 *European Law Rev*iew 359.

D'Amato, Anthony. "Do we owe a Duty to Future Generations to Preserve the Global Environment?" (1990) 84 *American Journal of International Law* 190.

Demsetz, Harold. "Toward a Theory of Property Rights". (1967) 57 *The American Economic Review* 347.

Fields, Wayne. "The Reply to Hayne: Daniel Webster and the Rhetoric of Stewardship". (1983) 11 *Political Theory* 5.

Fisher, Elizabeth. "Opening Pandora's Box: Contextualizing the Precautionary Principle in the European Union". Accessed at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=956952> from Vos, Ellen et al. (eds). *Uncertain Risks Regulated: National, EU and International Regulatory Models Compared*. Abingdon: Routledge-Cavendish, 2009.

Fogleman, Valerie. "Circular Facilities (London) Ltd v Sevenoaks DC: the meaning of "knowingly permitted" under the contaminated land regime". [2005] *Journal of Planning Law* 1269.

Foltz, Richard. "Is There an Islamic Environmentalism?" (2000) 22 *Environmental Ethics* 63.

Frazier, Terry W. "The Green Alternative to Classical Liberal Property Theory". (1995-1996) 20 *Vermont Law Review* 299.

Freyfogle, Eric T. "Context and Accommodation in Modern Property Law". (1989) 41 *Stanford Law Review* 1529.

Goldstein, Robert J. "Green Wood in the Bundle of Sticks: Fitting Environmental Ethics and Ecology into Real Property Law". (1997-1998) 25 *British Columbia Environmental Affairs Law Review* 347.

Gray, Kevin. "Property in Thin Air". (1991) 50 *Cambridge Law Journal* 252.

Green, Leslie. "Legal Obligation and Authority". First published 2003: viewed 11/02/2011. http://plato.stanford.edu/entries/legal-obligation/.

Gündling, Lothar. "Our Responsibility to Future Generations". (1990) 84 *American Jounral of International Law* 207.

Hartshorne, Charles. "The Rights of the Subhuman World". (1979) 1 *Environmental Ethics* 49.

Heyvaert, Veerle. "Facing the consequences of the precautionary principle in European Community Law". (2006) 31 *European Law Review* 185.

Hohfeld, Wesley N. "Fundamental Legal Conceptions as Applied in Judicial Reasoning". (1913) 23 *Yale Law Journal* 16.

Honoré, Tony. "Ownership" in Guest (Ed), *Oxford Essays in Jurisprudence*. Oxford: Oxford University Press, 1961.

Hunter, David B. "An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources". (1988) 12 *Harvard Environmental Law Review* 311.

Karp, James P. "A Private Property Duty of Stewardship - Changing our Land Ethic". (1993) 23 *Environmental Law* 737.

Kleinsaser, Zackary C. "Public and Private Property Rights: Regulatory and Physical Takings and the Public Trust Doctrine". (2005) 32 *British Columbia Environmental Affairs Law Rev.* 421.

Kritikos, Mihail. "Traditional risk analysis and releases of GMOs into the European Union: space for non-scientific factors?". (2009) 11 *European Law Review* 405.

Lee, Maria. "'New' environmental liabilities: the purpose and scope of the contaminated land regime and the Environmental Liability Directive". (2009) 11 *Environmental Law Review* 264.

Lucy, William N R and Mitchell, Catherine. "Replacing Private Property: The Case for Stewardship". (1996) 55 *Cambridge Law Journal* 566.

Macmaolain, Caoimhin. "Using the precautionary principle to protect human health: Pfizer v Council". (2003) 28 *European Law Review* 723.

Marmor, Andrei. "The Nature of Law". First published 2001: viewed 11/02/11. http://plato.stanford.edu/entries/lawphil-nature/.

Meyer, Lukas. "Intergenerational Justice". First published 2008: viewed 28/09/10. http://plato.stanford.edu/entries/justice-intergenerational/.

Metzger, Michael B. "Private Property and Environmental Sanity". (1975-1976) 5 *Ecology Law Quarterly* 793.

Nelson, R J. "Ethics and Environmental Decision Making". (1979) 1 *Environmental Ethics* 263.

Palmer, Claire. "Stewardship: A Case Study in Environment Ethics". Ball, J et al (eds), *The Earth Beneath*. London: SPCK, 1992.

Partridge, Ernest. "Book review of: R. I. Sikora and Brian Barry (eds), Obligations to Future Generations". (1979) 1 *Environmental Ethics* 371.

Paterson, John L. "Conceptualising Stewardship in Agriculture within the Christian Tradition". (2003) 25 *Environmental Ethics* 43.

Philbrick, Francis. "Changing Conceptions of Property in Law". (1937-1938) 86 *University of Pennsylvania Law Rev.* 691.

Poulter, Jim. "The Secret of Dreaming". http://learningtogive.org/resources/folktales/SecretOfDreaming.asp visited 28/09/10.

Povilitis, Anthony J. "On Assigning Rights to Animals and Nature". (1980) 2 *Environmental Ethics* 67.

Powell, Richard R B. "The Relationship Between Property Rights and Civil Rights". (1963-1964) 15 *Hastings Law Journal* 135b

Purdue, Michael. "The relationship between development control and specialist pollution controls: which is the tail and which is the dog?" [1999] *Journal of Planning Law* 585.

Radin, Margaret Jane. "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings". (1988) 88 *Columbia Law Review* 1667.

Raz, Joseph. "On the Nature of Rights". (1984) 43 *Mind* 194.

Rodgers, Christopher. "Nature's Place? Property Rights, Property Rules and Environmental Stewardship". (2009) 68 *Cambridge Law Journal* 550.

Rodgers, Christopher. "Property rights, land use and the rural environment: A case for reform". (2009) 26S *Land Use Policy* 134.

Rodgers, Christopher. "Rural Development Policy and Environmental Protection: Reorienting English Law for a Multifunctional Agriculture". (2009) 14 *Drake Journal of Agricultural Law* 259.

Rolston III, Holmes. "Is there an Ecological Ethic?" (1975) 85 *Ethics* 93.

Rossi, Hugh. "Paying for our Past - Will We?" (1995) 7 *Journal of Environmental Law* 1.

Sax, Joseph L. "Property Rights in the U.S. Supreme Court: A Status Report". (1987-1988) 7 *U.C.L.A. Journal of Environmental Law & Policy* 139.

Sax, Joseph L. "Property Rights and the Economy of Nature: Understanding Lucas v South Carolina Coastal Council". (1993) 45 *Stanford Law Review* 1433.

Sax, Joseph L. "The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention". (1970) 68 *Michigan Law Review* 471.

Scotford, Eloise. "The New Waste Directive - Trying to Do it All… An Early Assessment" (2009) 11 *Environmental Law Review* 75.

Sheard, Murray. "Sustainability and Property Rights in Environmental Resources". (2007) 29 *Environmental Ethics* 390.

Stacey, Robert C. "Agricultural Investment and the Management of the Royal Desmesne Manors 1236-1240". (1986) 46 *The Journal of Economic History* 919.

Stanton-Ife, John. "The Limits of Law". First published 2006: viewed 26/02/10. http://plato.stanford.edu/entries/law-limits/#cand

Steffen, Lloyd H. "In Defense of Dominion". (1992) 14 *Environmental Ethics* 63.

Stone, Christopher. "Should Trees Have Standing?: Towards Legal Rights for Natural Objects". (1972) 45 *Southern California LR* 450.

Swett, Katherine. "Review of Stewards, Lords and People: The Estate Steward and His World in Later Stuart England". (1995) 26 *The Sixteenth Century Journal* 68.

Thornton, Justine. "Contaminated land: the latest developments". [2009] *Journal of Planning Law* 8.

Vaughan, Stephen. "The contaminated land regime: still suitable for use?" [2010] *Journal of Planning Law* 142.

Waldron, Jeremy. "What is Private Property?" (1985) 5 *Oxford Journal of Legal Studies* 313.

Waldron, Jeremy. "Property". First published 2004: viewed 05/10/10. http://plato.stanford.edu/entries/property/

Warren, Mary Anne. "Do Potential People Have Moral Rights?" (1977) 7 *Canadian Journal of Philosophy* 275.

Watson, Richard A. "Self-consciousness and the Rights of Nonhuman Animals and Nature". (1979) 1 *Environmental Ethics* 99.

Welchman, Jennifer. "The Virtues of Stewardship". (1999) 21 *Environmental Ethics* 411.

White, Lynn Jr. "The Historical Roots of Our Ecological Crisis". (1967) 155 *Science* 1205.

Yannacone Jr, Victor John. "Property and Stewardship - Private Property Plus Public Interest Equal Social Property". (1978) 23 *South Dakota Law Review* 73.

Zaidi, Iqtidar H. "On the Ethics of Man's Interaction with the Environment: An Islamic Approach". (1981) 3 *Environmental Ethics* 35.

Government Publications

United Kingdom. DEFRA. *Environmental Protection Act 1990: Part IIA. Contaminated Land*. Circular 01/2006. London: 2006.

United Kingdom. DEFRA. *Guidance on the Legal Definition of Contaminated Land*. London: HMSO, 2008.

United Kingdom. DEFRA. *Public Consultation on Changes to the Contaminated Land Regime under Part 2A of the Environmental Protection Act 1990.* London: 2010.

United Kingdom, Department of the Environment. *Framework for Contaminated Land: Outcome of the Government's Polices Review and Conclusions from the Consultation Paper Paying for our Past*. London: 1994.

United Kingdom. Department of the Environment. *The Government's Response to the First Report from the House of Commons of Select Committee on the Environment: Contaminated Land*. London: 1990.

United Kingdom. Department of the Environment and Welsh Office. *Paying for Our Past*. London: 1994.

United Kingdom. Environment Agency. *Reporting the Evidence*. Bristol: 2009.

United Kingdom. Environment Committee. *First Report: Contaminated Land Vol I-III*. London: 1990.

United Kingdom. Environment Committee. *Second Report: Contaminated Land*. London: 1996.

United Kingdom. Environment, Transport and Regional Affairs Committee. *First Special Report. Government Response to the Second Report of the Environment Committee (Session 1996-1997): Contaminated Land - Report and Proceedings of the Committee*. London: HMSO, 1999.

United Kingdom. Hansard. House of Commons Hansard. Volume 258, Col 36 and 48 18/04/1995.

United Kingdom. National Rivers Authority. *Contaminated Land and the Water Environment*. London: 1994.

United Kingdom, Rossendale Borough Council. *Contaminated Land Inspection Strategy*. Rossendale: 2003.

United Kingdom. South Oxfordshire District Council. *Policy for the Recovery of Remediation Costs for Contaminated Land*. Viewed 12/10/10. http://www.southoxon.gov.uk/ccm/content/envhealth/environmental-protection/contaminated-land-pages/contaminated-land-faqs.en

United States. Environmental Protection Agency. *Everyday Choices: Opportunities for Environmental Stewardship*. Washington: 2005.

Websites

Bible: English Standard Version. Viewed 11/02/11. http://www.biblegateway.com

Duthchas: Our Place in the Future. Viewed 07/10/10. http://www.duthchas.org.uk/

National Religious Partnership for the Environment. Viewed 28/09/10.
www.nrpe.org

The Society for the Protection of Nature in Lebanon. Viewed 30/09/10.
http://www.spnl.org/load.php?page=hima_history

United Kingdom. DEFRA. Viewed 23/09/10.
http://www.defra.gov.uk/environment/quality/land/contaminated/

United Kingdom. DEFRA. Viewed 10/12/10.
http://ww2.defra.gov.uk/environment/quality/permitting/

United Kingdom. DEFRA. Viewed 10/12/10.
http://ww2.defra.gov.uk/environment/economy/waste/

United Kingdom. Ribble Valley Borough Council. Viewed 12/10/10.
http://www.ribblevalley.gov.uk/a_to_z/service/412/function.simplexml-load-file

United States. Environmental Protection Agency. Viewed 28/09/10.
www.epa.gov

Pamphlets

United States Conference of Catholic Bishops. *Renewing the Earth - A Pastoral Statement of the United States Catholic Conference. November 1991*. Viewed 28/09/10.
http://www.usccb.org/sdwp/ejp/bishopsstatement.shtml

The Duthchas Project. "Act Local: Community Planning for Sustainable Development. The Duthchas Handbook". Inverness: June 2001.

Religious Texts

Genesis. 2:15, English Standard Version.

Leviticus. 25, English Standard Version.

Psalm 148, English Standard Version.

Qu'ran 2:30.